# ARIZONA SUPREME COURT

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| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>BRYAN PATRICK MILLER,<br><br>Appellant. | CR–23–0157–AP<br><br>Maricopa County Superior Court<br>No. CR2015–102066–001<br><br>**[CAPITAL CASE]** |

## STATE OF ARIZONA'S ANSWERING BRIEF


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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion by denying Miller's motion to preclude the DNA evidence.

2. Whether the United States Constitution prohibits the execution of adults who commit murder between the ages of 18 and 21.

3. Whether the (F)(2) "previously convicted" aggravating factor can be found for felonies tried simultaneously with the murder.

4. Whether Miller's consecutive sentences for the sexual assault convictions violate A.R.S. § 13–116.

5. The trial court did not state reasons for the consecutive sentences under *State v. Perez-Gutierrez*.

6. Whether different prior convictions can support different aggravating factors.

7. Whether sufficient evidence supports that Miller's 1993 offenses of kidnapping and attempted sexual assault while using a dangerous weapon were dangerous offenses.

8. Whether, on independent review, Miller's mitigation is sufficiently substantial to warrant leniency in light of the multiple aggravating factors, the State's rebuttal evidence, and the circumstances of the murders.

9. Whether this Court should reconsider other constitutional challenges to Arizona's death-penalty statute that have been previously rejected.

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## STATEMENT OF THE CASE

In 2015, a Maricopa County Grand Jury indicted Bryan Patrick Miller on six counts: first-degree murder (Counts 1 and 2), kidnapping (Counts 3 and 4), and attempted sexual assault (Count 5 and 6). R.O.A. 9. Miller raised an insanity defense, was found competent to stand trial, and waived his right to a jury trial. R.O.A. 516; R.T. 10/17/22, 3–7; R.T. 3/2/22, 4–15.

On April 11, 2023, the trial court found Miller guilty of the kidnapping, attempted sexual assault, and first-degree murder of Andrea; and the kidnapping, attempted sexual assault, and first-degree murder of Melissa.[1] The court sentenced Miller to death on both first-degree murder counts and imposed presumptive sentences on the non-capital counts. The following facts, presented in the light most favorable to sustaining the verdicts, support Miller's convictions and sentences. *See State v. Nelson*, 229 Ariz. 180, 183 n.2 (2012).

### A. *Miller's Plan.*

In 1990, Miller's mother found a document that concerned her enough that she took it to the Phoenix Police Department. R.T. 10/4/22, at 56–58. Referred to as "The Plan," the document summarized Miller's plot of what he wanted to do to

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[1] Pseudonyms are used in place of the victims' true names to protect their privacy. *See* Ariz. R. Crim. P. 31.10(f).

a young woman of about 17 years old. Ex. 414; R.T. 10/4/22, at 57; R.T. 11/2/22, at 132–33. Miller wanted to kidnap a young woman, cut her clothes off, rape her, cut her to scare her, kill her by slicing open her belly, and preserve the head to look at in the future. Ex. 414. The Plan included using certain tools: a long-bladed knife, a carving knife, a garbage bag to hold body parts, a container to put blood in, gloves, and a black hood. Ex. 414.

Between 1992 and 1993, Miller's plan became a horrific reality.

**B. *Andrea.***

On the evening of November 8, 1992, Andrea left her house for a bike ride. R.T. 10/4/22, at 22. It was the week of her 23rd birthday. *Id.* She never returned home. *Id.* at 25.

On November 9, Officer Wamsley found Andrea's headless body off the canal path near 25th Avenue and Cactus Road. R.T. 10/03/22, at 48–49, 56–59.

On November 20, Andrea's head was found in the canal on the west side of the I-17, over a mile away from her body. *Id.* at 137; Exs. 312–315. The medical examiner could not determine how long Andrea's head had been in the canal. *See* R.T. 10/04/22, at 122. *But cf.* R.T. 5/25/23, at 34–36 (arguing "He kept her head for some period of time."); Ex. 414 (Miller describing his desire to preserve a head).

Miller used a knife to stab Andrea once in the back, penetrating her aorta and left lung. R.T. 10/04/22, at 126–28, 159, 171. The blow was strong enough to fracture one of her ribs. *Id.* at 128.

Miller stabbed Andrea many more times, although there were so many that the medical examiner couldn't determine how many occurred while Andrea was alive. *Id.* at 121, 146, 169, 195. There was postmortem mutilation by multiple incised sharp force injuries, including multiple stab wounds. *Id.* at 144–46, 161–62. Andrea was almost cut in half at her waist. *Id.* at 163; *see* Exs. 329–30. Miller dragged her body from the bike path into a field. R.T. 10/3/22, 104, 116.

Andrea's clothing had been cut from her body. *Id.* at 132–33, 36. It was found strewn along the path to where her body was found. *Id.* at 109, 130–37. Andrea was found nude, apart from her shoes and socks. *Id.* at 64; *see* Exs. 279–84. Sperm was recovered from vaginal swabs and a semen stain on Andrea's clothing. R.T. 10/04/22, at 162; R.T. 10/27/22, at 103, 128–30; R.T. 10/31/22, 40–42.

The medical examiner concluded Andrea's cause of death was the stab wound to the chest. R.T. 10/04/22, at 159.

Police never recovered Andrea's bicycle. *Id.* at 36; R.T. 10/5/22, at 11.

### C. *Melissa.*

Melissa was last seen the evening of September 21, 1993, and was found dead in the canal the following day. R.T. 10/5/22, at 89, 102. She had just turned 17. *Id.* at 85. Melissa was found near the I-17 and Dunlap, less than two miles from where Andrea was murdered and about 400 feet from where Andrea's head was found. *Id.* at 18, 106, 149.

Miller stabbed Melissa in the back, incising the lung and aorta. R.T. 10/10/22, at 23. Her neck was cut. *Id.* at 17. Melissa suffered vaginal injuries and lacerations consistent with penetration. *Id.* at 30–32; *see* Ex. 394. However, the medical examiner couldn't determine whether Melissa was still alive when Miller raped her. *Id.* at 32. Sperm was recovered from Melissa's vagina. *Id.* at 36.

On Melissa's chest, Miller used a knife to carve a Latin cross and the letters "WSC." R.T. 10/5/22, at 119–120; *see* Exs. 386–87.

Melissa laid for some period of time after she was stabbed in the back, causing a large amount of blood to pool on the asphalt. R.T. 10/5/22, at 22, 68. The blood trail and skin abrasions indicated Melissa was dragged over the curb into some bushes before being dragged back across the path to the canal. *Id.* at 23, 32, 68–69, 128–32, 154; R.T. 10/10/22, at 22; Exs. 356–57, 360, 363–65. Miller cut off Melissa's clothes, which were found in a nearby dumpster. R.T. 10/5/22, at 109, 123. At some point, Miller dressed Melissa in a turquoise body suit that he

had brought with him. *Id.* at 88, 118–19; R.T. 10/27/22, 27–28; R.T. 10/10/22, at 12, 16.

Police never recovered Melissa's bicycle. R.T. 10/5/22, at 137.

Miller would ride his bike along the canals at night and often carried a knife with him. R.T. 10/27/22, at 19, 22, 29. When Miller's roommate saw reports of Melissa's death, he asked Miller "weren't you out there that night, the night that happened," and Miller responded "that he was riding on the eastside of town that night." *Id.* at 25–26. Miller had previously taken one of the roommate's kitchen knives. *Id.* at 24.

The medical examiner concluded the cause of death was the stab wound to the chest and resulting blood loss. R.T. 10/10/22, at 37.

**D. *Catching Miller.***

The murders of Andrea and Melissa were linked to the same DNA profile recovered from both women. R.T. 11/2/22, at 110.

In 2014, forensic genealogist, Dr. Fitzpatrick ran the Y-STR profile through a database of genetic ancestry information and generated a last name of "Miller" and an ethnicity of "Caucasian." *Id.* at 130; R.T. 10/10/22, at 97; *see also* R.O.A. 451; R.O.A. 460.

Phoenix Police began surveilling Bryan Miller. R.T. 10/10/22, at 72, 100, 131. To acquire his DNA, police went undercover and approached him using a

ruse of a potential security job. *Id.* at 73. On January 2, 2015, undercover detectives met with Miller at a Chili's restaurant. *Id.* at 74. Chili's management agreed to provide Miller specific utensils and to avoid the normal table bussing. *Id.* at 110–15.

Police seized a mug that Miller used to drink water at the Chili's restaurant. *Id.* at 119–20. The DNA found on the mug matched the DNA from both murder scenes. R.T. 10/31/22, at 137–38. After Miller's arrest, the court granted the State's motion for an order to "submit to the taking of Buccal Swabs." R.O.A. 6; R.O.A. 10; R.O.A. 11. *See* Ariz. R. Crim. P. 15.2(a)(1)(F). DNA from the buccal swab matched both the DNA from the mug and the crime scenes. R.T. 10/31/22, at 140–42.

Police served a search warrant at Miller's house on January 13. R.T. 10/10/22, at 76. They found violent pornography in Miller's house, including "photos, extremely violent in nature, involving knives, women bleeding, women being mutilated, cut, stabbed." *Id.* at 124. *See* R.T. 3/13/23, at 46; Exs. 398–401. They also found dozens of knives. R.T. 10/10/22, at 81.

**E. *Trial.***

The bench trial occurred from October 2022 to June 2023. R.O.A. 720; 933. In addition to the above, the State presented evidence of an incident in 1989 when Miller stabbed a woman named Celeste in her back at the Paradise Valley Mall.

R.T. 10/11/22, at 88–104; Exs. 538–39. Miller told police that he stabbed Celeste "to see what it felt like" and "said it sent chills up his spine." R.T. 11/2/22, at 33.

Miller was also arrested for stabbing a woman in Washington in 2002, but he was acquitted on the criminal charges after claiming self-defense. R.T. 12/5/22, at 82; R.T. 2/15/23, at 23; R.T. 3/9/23, at 74–75.

Miller told his wife Amy about a stabbing attack in Washington, "that he had been the one to perpetrate that attack" and he "hid in the bushes waiting for someone to walk by. And when she did, he came out and had attacked her with a knife." R.T. 3/9/23, at 129–30; *see* R.T. 2/15/23, at 28.

The State presented evidence that Miller had engaged in sexually sadistic acts with his wife Amy, using knives and needles, and cuts into her breast. *See, e.g.*, R.T. 3/9/23, at 115–16, 146; R.T. 3/29/23, at 25–29. Amy described how Miller would put needles "through both lips in alternating fashion basically sewing [her] mouth shut using the straight pins." R.T. 3/29/23, at 28. He also wrote disturbing letters to Amy while he was in jail for the 2002 stabbing. *See* R.T. 3/13/23, at 47; *see, e.g.*, Ex. 579.001 ("I have a fantasy of kidnapping you and taking you somewhere private, holding you as a hostage for the weekend. I would tie you up in a room and go into the next making you wait wondering what I was going to do to you.").

Amy explained that she became afraid of Miller and that she was compliant with him to keep herself safe. R.T. 3/9/22, at 115, 144–45. The jury also heard how Miller put his needs above the family, R.T. 5/15/23, at 13–15, and left his daughter alone as young as 6, and she is in counseling to address the trauma of growing up with Miller, *id.* at 20–21.

Miller would discuss with Amy descriptions of women that he found attractive and that "he had wanted to harm or kill." R.T. 5/15/23, at 10–11.

Miller also sometimes choked his later girlfriend Seraphina. R.T. 12/5/22, at 77, 80–81.

The State presented expert testimony from Dr. Kohlhepp that Miller was not insane at the time of the stabbings. R.T. 3/6/23, at 130–31. The State presented expert testimony from Dr. Garby that Miller knew right from wrong. R.T. 3/13/23, at 109, 154–55; R.T. 03/14/23, at 56.

The trial court appointed an expert to evaluate Miller, Dr. Kirby, who concluded that Miller "was legally sane at the time of the alleged offenses." R.T. 2/27/23, at 17, 20; *see* Ex. 834. Dr. Kirby opined that Miller "probably had or probably met criteria for the persistent depressive disorder, the generalized anxiety disorder, the PTSD, the sexual sadism disorder, and the hoarding disorder, and also probably the antisocial personality disorder." R.T. 2/28/23, a.m., at 16–17. But she explained the "PTSD was at least partially in remission." *Id.* at 9.

The State presented additional expert testimony that Miller has antisocial personality disorder. R.T. 3/20/23, at 67; R.T. 3/06/23, at 92–97. The State also presented expert testimony from Dr. Garby that Miller has sadistic sexual paraphilias, specifically cannibalism and necrophilia. R.T. 3/06/23, at 92; R.T. 3/14/23, at 7.

The trial court found Miller guilty on all six counts. R.T. 4/11/23, 3–5; R.O.A. 863–68.

The trial court found three aggravating factors for each murder. R.T. 4/12/23, at 38–40; R.O.A. 926. The trial court found that Counts 3 through 6 were each dangerous offenses. R.O.A. 873–76.

For the murder of Andrea, the court found Miller was previously convicted of murder (F)(1), previously convicted of a felony involving the use or threat of violence (F)(2) (1992), and that Miller committed the offense in an especially heinous or depraved manner (F)(6). R.O.A. 926.

For the murder of Melissa, the court found Miller was previously convicted murder (F)(1), previously convicted of a serious offense (F)(2) (1993), and that Miller committed the offense in an especially heinous or depraved manner (F)(6). R.O.A. 872.

**F. *Sentences.***

The parties presented 14 days of testimony at the penalty phase. *See* R.O.A. 883; R.O.A. 909. Miller proffered 86 non-statutory mitigating factors and two statutory factors. *See* R.O.A. 81; *see also* 5/22/23, at 122–24 (allocution). After taking the matter under advisement, the trial court sentenced Miller to death for each murder. R.T. 6/7/23, at 13; *see* R.O.A. 924.

The trial court detailed its findings in a 26-page order. R.O.A. 926. Regarding the heinous and depraved aggravator, the court found, in part, that:

> Andrea died relatively quickly after [Miller] stabbed her, and the evidence shows that [Miller] sexually assaulted her after she died. [Miller] mutilated Andrea's body by inflicting numerous wounds including a knife wound from her neck to her pelvis and a cut around her entire torso. [Miller] then removed Andrea's head and carried it for some distance before discarding it in the canal.
>
> Less than one year later, [Miller] murdered Melissa. She too died very quickly. He cut into her body, making incisions on her breasts and neck and carving initials into her chest. The evidence shows that, as he did with Andrea, [Miller] sexually assaulted Melissa after she died. [Miller] removed Melissa's clothes and dressed her in a bodysuit that he brought to the scene of the crime. [Miller] discarded Melissa into the canal when he was done.
>
> The heinousness and depravity surrounding these two young women's murders are clearly beyond the pale. [Miller] did not just murder these young women, he brutalized them.

R.O.A. 926 at 2.

Regarding Miller's mitigation, the court found that he failed to prove he was impaired in his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, specifically that:

> [Miller] has proven he suffers from depression, anxiety, and hoarding disorder. The Court does not find that [Miller] has anti-social personality disorder. The Court finds that [Miller] may have high functioning Autism but the proof of that does not rise to the level of preponderance of the evidence. The Court specifically does not find that [Miller] had any of the dissociative disorders or PTSD. As discussed above, The Court finds that [Miller] is a sexual Sadist.
>
> The Court finds that the nature and quality of these maladies are insufficient to establish the (G)(1) mitigating circumstance. The Court is convinced by [Miller's] actions that he was not significantly impaired in his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> First, evidence relating to [Miller's] stabbing of Celeste [] at the Paradise Valley Mall demonstrate that he had sufficient capacity to appreciate the wrongfulness of his actions. [Miller] attempted to flee the scene of that crime, changed his clothing in order to evade capture, discarded the knife he used to stab Celeste, and initially lied to police concerning his involvement. After police apprehended him, [Miller] eventually admitted that what he did was wrong and has more recently claimed remorse for his actions. This crime was 3-4 years prior to the murders. The Court sees no change in circumstances from this event to the killings of Andrea and Melissa.
>
> Furthermore, the evidence recovered from Andrea and Melissa's murders indicate that [Miller] planned the killings and sought to obscure the evidence that he carried them out. [Miller] committed both crimes in poorly lit areas away from the public. [Miller] moved both Andrea and Melissa's bodies during the commission of the crimes, and then removed Melissa completely from the crime scene. [Miller] brought a knife in both instances, and in Melissa's case [Miller] brought a body suit. Soon after Melissa's was murdered [Miller] lied to Randy [] about being in the area. After police arrested

> [Miller] in this case, he lied about being familiar with the areas where Andrea and Melissa died, even though independent evidence established that [Miller] routinely rode his bicycle there.

R.O.A. 926 at 7.

The court found that Miller, 20 at the time of the murders, proved the age statutory mitigating circumstance, but noted that Miller "did not steal a car and go joyriding. He planned and executed the murder and sexual assault of two women 10 months apart." *Id.* at 8,

The court found that Miller failed to prove 38 of his non-statutory mitigating factors. *Id.* at 8–16. The court found other factors proven, *id.* at 16–21, including 22 factors relating to abuse Miller suffered as a child, *id.* at 21–22. But the court found that Miller "is not a reliable reporter," noting, in part, that he lied to police when arrested in 2015. *Id.* at 22.

The court found the mitigation was not sufficiently substantial to call for leniency. *Id.* at 25.

Miller filed a timely notice of appeal from the judgment and sentence. R.O.A. 923. On June 19, 2023, Miller filed a motion for a new trial R.O.A. 930, which the court denied, R.O.A. 950, and Miller filed an amended notice of appeal. R.O.A. 951. This Court has jurisdiction under Arizona Constitution Article VI, Section 5(3), and A.R.S §§ 13–755, –4031, and –4033(A).

## ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DIRECTION WHEN IT DENIED THE MOTION TO SUPPRESS THE DNA EVIDENCE.

Miller argues the trial court should have granted his suppression motion based on the warrantless search of the mug at Chili's. O.B. at 46. The trial court did not abuse its discretion in denying Miller's motion because a warrant is not required to search abandoned property.

#### A. *Standard of Review.*

This Court reviews a trial court's denial of a motion to suppress for an abuse of discretion. *State v. Champagne*, 247 Ariz. 116, 131, ¶ 28 (2019). Purely legal issues, however, are reviewed de novo. *Id.* This Court is "obliged to affirm the trial court's ruling if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464 (1984). On appeal from a denial of a motion to suppress, this Court confines its review to the facts presented at the suppression hearing, reviewing those facts in the light most favorable to sustaining the trial court's ruling. *State v. Thompson*, 252 Ariz. 279, 290, ¶ 26 (2022).

#### B. *Facts and Procedural History.*

Miller moved to suppress the DNA evidence from his saliva recovered from the Chili's restaurant. R.O.A. 451. The State responded that Miller did not have a subjective expectation of privacy in either the mug, or the saliva left on the mug, that he left at a public restaurant. R.O.A. 460, at 5–6. The State also argued that

there is no reasonable expectation of privacy in DNA left in a public place. *Id.* at 6–7. The State noted the intense amount of media in American culture depicting the use of DNA to solve crime and that rules requiring a separate warrant to search evidence for DNA are "not what society expects and are not what the law requires." *Id.* at 9; *see id.* at 8 ("NCIS is currently the second longest running scripted, non-animated U.S. primetime TV series on air. It is beaten only by Law and Order: Special Victims Unit.").[2] The State also noted that Miller lacked standing to challenge the seizure of the mug owned by Chili's. *Id.* at 9.

The trial court heard oral argument on the motion on December 11, 2020. R.O.A. 486; R.T. 12/11/20, p.m., at 72. *See also* R.O.A. 470 (reply). At the hearing, the DNA analyst testified that Miller's DNA profile matched evidence from the crime scenes. R.T. 12/11/2020, a.m., at 38–41.

On January 21, 2021, the court denied the motion to suppress:

> Here, the evidence [Miller] abandoned the mug at the restaurant is conclusive. [Miller] did not indicate any subjective expectation of privacy as to the mug. The facts here are not analogous to that of a restaurant diner who temporarily leaves the table with the obvious intent of returning to his or her meal. The record shows that it was

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[2] Indeed, in one North Carolina case, when police questioned a suspect who was done smoking a cigarette he "took apart the butt, removing the filter's wrapper and shredding the filter before placing the remains in his pocket [and] mentioned watching the popular network television police procedural, *CSI: Crime Scene Investigation*." *State v. Reed*, 641 S.E.2d 320, 321 (N.C. App. 2007).

> only after [Miller] left the restaurant, voluntarily leaving the mug that the detective impounded the mug.
>
> Further, it is not objectively reasonable or consistent with societal standards to recognize an expectation of privacy in a used item left on a restaurant table. Customers who walk to a restaurant's exit, having left such items behind, implicitly communicate their intent to abandon them. The fact remains that the onus would be on a customer to both interrupt the expected table-clearing efforts of restaurant staff and somehow abscond with the restaurant's table setting to maintain some intent to retain a privacy interest in the property supports the reasonable expectation of abandonment, not privacy.
>
> [Miller], in fact, argues that restaurant patrons typically expect the restaurant employees to clear the table when the employees have reason to believe a customer has decided to leave. He also maintains that a typical customer would expect his trash to be tossed out and all the dishes sanitized by restaurant employees, not intercepted by the police. However, the United States Supreme Court has rejected that kind of argument.

R.O.A. 492 at 5 (citing *California v. Greenwood*, 486 U.S. 35, 39–41 (1988); and *People v. Daggs*, 133 Cal.App.4th 361, 369 (2005)).

### C. ***The trial court correctly concluded that Miller had no expectation of privacy in the abandoned mug.***

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things seized." Its corollary in the Arizona

Constitution, Article 2, Section 8, states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

A "search" under the Fourth Amendment occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Someone invoking the Fourth Amendment protections bears the burden of demonstrating his or her legitimate expectation of privacy in the place searched or items seized. *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *see Illinois v. Andreas*, 463 U.S. 765, 772 (1983) (examination of item in plain view, without a claim to privacy "is not a 'search' within the intendment of the Fourth Amendment"); *Jacobsen*, 466 U.S. at 120 (same applying private-party exception). The inquiry is in two-parts: first, has the defendant manifested a "actual (subjective) expectation of privacy" in the object of the search; second, is society willing to recognize that expectation as "justifiable" under the circumstances. *Smith*, 442 U.S. at 740 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)); *see also Greenwood*, 486 U.S. at 41 (finding no "expectation of privacy in trash left for collection in an area accessible to the public"). Thus, if the actions by the Phoenix police did not intrude upon Miller's legitimate expectation of privacy, there was no "search" subject to the Fourth Amendment. *See Andreas*, 463 U.S. at 771; *State v. Allen*, 216 Ariz. 320, 323, ¶ 13 (App. 2007).

A long-accepted corollary to the reasonable expectation of privacy standard is that "warrantless searches of abandoned property do not violate the Fourth Amendment." *United States v. Burnette*, 698 F.2d 1038, 1047 (9th Cir. 1983) (citing *Abel v. United States,* 362 U.S. 217, 240–241 (1960)). "A person retains no privacy interest ... in abandoned property." *State v. Huerta*, 223 Ariz. 424, 426, ¶ 5 (App. 2010). Indeed, "persons who voluntarily abandon property lack standing to complain of its search or seizure." *United States v. Baker*, 58 F.4th 1109, 1116–17 (9th Cir. 2023) (quoting *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986)).

Property is abandoned in the Fourth Amendment context[3] when "the person prejudiced by the search [] voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Huerta*, 223 Ariz. at 426, ¶ 5 (quoting *State v. Walker*, 119 Ariz. 121, 126 (1978)). A person's intent to abandon property "is determined by objective

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[3] Arizona courts have declined to expanded our state constitution's protections in the abandoned-property context beyond the Fourth Amendment, *Huerta*, 223 Ariz. at 429, ¶ 18, and this Court should not do so now, *see State v. Mixton*, 250 Ariz. 282, 290, ¶ 32 (2021) ("[T]he Private Affairs Clause provides broader protections to the home than the Fourth Amendment [b]ut we have also recognized the value in uniformity with federal law when interpreting and applying the Arizona Constitution.").

factors, not the defendant's subjective intent .... The appropriate test is whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned." *Id.* (quoting *People v. Pereira*, 58 Cal. Rptr. 3d 847, 852 (App. 2007)); *see also Nordling*, 804 F.2d at 1469 ("[A]bandonment is a question of intent. The inquiry should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure.").

Here, the trial court found that Miller had abandoned the mug that he left at the table when leaving the Chili's restaurant noting "it was only after [Miller] left the restaurant, voluntarily leaving the mug that the detective impounded the mug." R.O.A. 492 at 5. The court also found "it is not objectively reasonable or consistent with societal standards to recognize an expectation of privacy in a used item left on a restaurant table." *Id.*

Miller does not challenge the court's analysis regarding the mug left at the restaurant. *See* O.B. at 46–69. Because Miller's DNA was taken from a mug, as opposed to being taken from Miller's person (such as a buccal swab of his inner cheek), the acquiring of this sample did not require any intrusion upon Miller's body and, therefore, did not automatically qualify as a search. *Cf. Maryland v. King*, 569 U.S. 435, 446 (2013) (stating that "using a buccal swab … to obtain

DNA samples is a search"); *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (compelling fingerprints from a suspect requires probable cause and a warrant).

Instead, Miller asserts that the abandonment doctrine should not apply to genetic information left on discarded items. O.B. at 59–63. Miller cites no case authority for this proposition, and the State is aware of none.

Citing several dissenting opinions, Miller asserts that DNA should be "deemed a person's 'person' and 'papers,' and the government's intrusion into it should be deemed a trespass search." O.B. at 51–52. But because there can be no reasonable expectation of privacy in "[w]hat a person knowingly exposes to the public," *Katz*, 389 U.S. at 351, it has been held that individuals have no expectation of privacy in many aspects of their identifying characteristics, *see e.g.*, *United States v. Mar*a, 410 U.S. 19, 21–22 (1973) (no expectation of privacy in a person's handwriting); *United States v. Dionisio*, 410 U.S. 1, 9–10 (1973) (voice); *United States v. Knotts*, 460 U.S. 276, 281 (1983) (public movements); *State v. Coleman*, 122 Ariz. 130, 133 (App. 1978) (characteristics of the soles of appellant's shoes).

Indeed, every court that has considered this question has consistently found no expectation of privacy in DNA found on an abandoned item. *See, e.g.*, *State v. Westrom*, 6 N.W.3d 145, 154–55 (Minn. 2024), *cert. denied*, 145 S.Ct. 418 (2024) (DNA on discarded napkin); *State v. Vannieuwenhoven*, 8 N.W.3d 63, 73, ¶ 34

(Wis App. 2024) (DNA from licked envelop provided to police); *State v. Athan*, 158 P.3d 27, 43 (Wash. 2007) (same); *State v. Alarcon*, 1 CA-CR 18-0165, 2020 WL 207059, at *4, ¶ 26 (Ariz. App. Jan. 14, 2020) (mem. decision) (DNA on juice container); *Lovchik v. Commonwealth*, 2020 WL 6139896, at *4 (Va. Ct. App. Oct. 20, 2020) (DNA on items in trash can); *Marino v. Commonwealth*, 488 S.W.3d 621, 625 (Ky. Ct. App. 2016) (DNA on cup in police station); *State v. Williford*, 767 S.E.2d 139, 144 (N.C. App. 2015) (DNA on cigarette butt); *People v. Gallego*, 117 Cal. Rptr. 3d 907, 912 (Cal. App. 2010) (same); *State v. Bortree*, 2021-Ohio-2873, ¶ 62 (Ohio App. 2021) (same), *rev'd on other grounds*, 212 N.E.3d 874 (Ohio 2021); *United States v. Hicks*, 2020 WL 7311607 at *2 (W.D.Tenn. 2020) (same); *Raynor v. State*, 99 A.3d 753, 767 (Md. 2014), *cert. denied*, 135 S.Ct. 1509 (2015) (DNA on chair in police station); *People v. Sterling*, 57 A.D.3d 1110, 1111 (N.Y. App. 2008) (DNA on milk carton); *Commonwealth v. Perkins*, 883 N.E.2d 230, 238–240 (Mass. 2008) (DNA from soda given by police); *Piro v. State*, 190 P.3d 905, 911 (Idaho Ct. App. 2008) (DNA from water bottle); *see State v. Wickline*, 440 N.W.2d 249, 253 (Neb. 1989) (saliva on cigarettes left at police station); *see also State v. Hauge*, 79 P.3d 131, 145–46 (Hawai'i 2003) (rejecting a parade of horribles argument where DNA is being used for identification purposes only).

The California Court of Appeals posed the following rhetorical question in a case where the suspect's DNA was retrieved from a cigarette butt abandoned on a public sidewalk:

> What if the police here, instead of testing the cigarette butt for defendant's DNA to identify him in an ongoing criminal investigation, had merely obtained defendant's fingerprint from the cigarette butt to identify him. Would defendant be able to assert, under the Fourth Amendment, a reasonable expectation of privacy in the testing of the cigarette butt for fingerprint identification purposes? No, he would not.

*Gallego*, 117 Cal. Rptr. 3d at 914.

Citing this Court's recent decision in *State v. Mitcham,* 258 Ariz. 432 (2024), Miller argues that any analysis to obtain genetic materials is a "search" under the Fourth Amendment. He is mistaken.

This Court in *Mario W. v. Kaipio*, 230 Ariz. 122, 126–27, ¶¶ 18, 20 (2012), recognized that processing "seized cells" to develop a DNA profile implicates an individual's privacy interest and constitutes a "search." But that holding involved "seized" DNA, rather than an "abandoned" item from which a DNA profile may be obtained. Instead, *Mario W.*, addressed whether a statutory scheme, which required juveniles charged with certain offenses to provide a buccal swab for DNA analysis, violated the Fourth Amendment. 230 Ariz. at 123–24, ¶ 1. It did not address a situation where police developed a DNA profile from evidence lawfully obtained through other means.

The United States Supreme Court subsequently suggested that developing a DNA profile after lawfully obtaining a DNA sample does not violate the Constitution if the information developed reveals nothing more than identification. *See Maryland v. King*, 569 U.S. 435, 464 (2013) ("[T]he processing of respondent's DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional."). In *King*, the Court wrote, "[i]n this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene." *Id.* at 451. *See id.* at 464–65 ("If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.").

This Court in *Mitcham* held that *King* did not overrule *Mario W.*'s conclusion that processing a sample seized from a suspect to extract a DNA profile is a "search." *State v. Mitcham*, 258 Ariz. 432, 439, ¶ 23 (2024), *cert. denied*, 145 S.Ct. 1965 (2025). This Court then "concluded that extracting Mitcham's DNA profile in 2018 from the second vial of blood taken during his 2015 DUI arrest was a 'search' under the Fourth Amendment." *Mitcham*, 258 Ariz. at 439, ¶ 24 (citing

*Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 616 (1989); *State v. Martinez*, 570 S.W.3d 278, 292 (Tex. Crim. App. 2019); and *People v. Thomas***,** 132 Cal. Rptr. 3d 714, 716 (Cal. App. 2011)).

But Miller's reliance on *Mitcham* and *Mario W.* is misplaced because neither case addressed DNA processed from *abandoned* property. *See* O.B. at 53. This is further supported by examining the cases this Court relied upon in *Mitcham*.

The distinction is most apparent in *People v. Thomas*, where the court, relying on *Skinner*, noted that "[w]hen an individual is compelled to provide a biological sample for analysis, the collection and subsequent analysis of the sample are treated as separate searches because they intrude on separate privacy interests." *Thomas***,** 132 Cal. Rptr. 3d at 716; *accord Mitcham*, 258 Ariz. at 439, ¶ 24. But in *Thomas*, the defendant was stopped for a traffic violation during which he passed a breathalyzer test. 132 Cal. Rptr. 3d at 715. He "was let go after passing all tests, but instead of discarding the mouthpiece of the PAS device, the police preserved it for DNA testing [which] linked defendant to two burglaries." *Id.* The court found that the "defendant in this case had no privacy right in the mouthpiece of the PAS device, which was provided by the police, and he abandoned any expectation of privacy in the saliva he deposited on this device when he failed to wipe it off." *Id.* at 717. The court also noted that the saliva "was not the material collected for the

limited purpose of the implied consent statute, and its subsequent testing was not dependent on defendant's express or implied consent." *Id.* at 719.

*Skinner* was not a criminal case but involved the collection and analysis of urine samples for mandatory suspicion-less drug testing of railroad employees. 489 U.S. at 610–11. The Court found both the collection and analysis were searches because passing urine is traditionally done in private and urine analysis can reveal private medical facts. *Id.* at 616–617. The case did not involve abandoned property but rather the government seeking to "obtain physical evidence from a person." *Id.* at 616. The Court also noted "[t]here are few activities in our society more personal or private than the passing of urine." *Id.* at 617 (citation omitted).

In *Martinez*, the Texas court held the defendant had not abandoned blood taken by hospital staff after he was brought in after a traffic accident. *Martinez*, 570 S.W.3d at 281–82 ("The Defendant was conscious during the blood draw, though not entirely coherent."). The court rejected the state's abandonment argument, noting it lacked "common sense," specifically concluding that having the blood taken by the hospital was "a far cry from leaving the blood in a public place accessible to anybody." *Id.* at 287. Only *after* concluding the blood was not abandoned did the court address and conclude that the subsequent analysis of the seized blood was a "search." *Id.* at 290–91. *See also United States v. Davis*, 657 F.

Supp. 2d 630, 649 (D. Md. 2009) (distinguishing seizure of gunshot victim's bloody clothes at hospital, from "covert involuntary DNA sampling" cases such as "spitting out gum, discarding a disposable coffee cup, or throwing away a used tissue," which demonstrate "an intent to abandon"), *aff'd*, 690 F.3d 226, 244 (4th Cir. 2012) (testing victim's clothes was a "search" for Fourth Amendment purposes).

Although the DNA analysis of the blood taken by limited consent in *Mitcham*, or by the hospitals in *Martinez* and *Davis*, were each a "search," Miller's DNA was found on property he abandoned. And as held by the court in *Thomas*, and the numerous other courts cited *supra*, analyzing abandoned property in which a defendant has no reasonable expectation of privacy does not constitute a "search" for Fourth Amendment purposes.

Finally, Miller briefly asserts that abandonment was involuntary here because the police used a ruse with a promise of potential employment when asking to meet him at the restaurant. O.B at 66–67. This argument fails. It is well-established that the "government is entitled to use decoys and to conceal the identity of its agents." *State v. Poland*, 132 Ariz. 269, 277 (1982) (quoting *Lewis v. United States*, 385 U.S. 206, 209 (1966)); *see United States v. Daniels*, 290 Fed. Appx. 986, 987 (9th Cir. 2008) (police spoke to defendant "under the ruse that he

was a representative of a temporary employment agency who wanted to send [defendant] an employment package").

In *People v. LaGuerre*, 29 A.D.3d 820 (N.Y. App. 2006), the court considered an elaborate law enforcement ruse to obtain an abandoned DNA sample. Detectives posing as employees of a chewing gum manufacturer asked a sex crime suspect to chew a stick of gum and deposit it in a cup as part of a contrived "Pepsi taste test challenge." *LaGuerre*, 29 A.D.3d at 822. The gum was analyzed for DNA type. The court held that the suspect "freely discarded and abandoned [the gum] inside a cup that he handed to a police detective during the supposed taste test" and thus was not denied due process as a result of police deception. *Id.* at 823. *See Athan*, 158 P.3d at 33–34 (police sent suspect letter purporting to be from a law firm inviting him to participate in a class action lawsuit); *see also Com. v. Ewing*, 854 N.E.2d 993, 1001 (Mass. App. 2006), *aff'd*, 873 N.E.2d 1150 (Mass. 2007) (no coercion when DNA recovered after police offered suspect food and cigarettes).

Therefore, the analysis of DNA obtained from an article abandoned by a suspect and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment.

### D. *This Court should decline Miller's invitation to radically expand the Private Affairs Clause of the Arizona Constitution.*

Miller also argues that his DNA should have been suppressed under the Private Affairs clause of the Arizona Constitution. O.B. at 54, 63. That clause provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. Art. 2, § 8.

In his suppression motion, Miller relied only on this Court's decision in *Mixton*, R.O.A. 451, at 26, which the trial court here noted "recognized the value in uniformity with federal law when interpreting and applying the Arizona Constitution." R.O.A. 492, at 4 (quoting *Mixton*, 250 Ariz. at 290, ¶ 32). Although Miller raises a more-developed theory of his argument on appeal, this Court should decline to consider arguments not sufficiently developed at the trial court. *See Mitcham*, 258 Ariz. at 445, ¶ 47 ("[W]e do not address Mitcham's arguments based on the Arizona Constitution's Private Affairs Clause, as they were neither raised at the trial court nor sufficiently developed here.").

Regardless, Miller's argument fails because there is no expectation of privacy under our state constitution in abandoned information. As this Court held, information "voluntarily shared with third parties" is "inconsistent with privacy." *Mixton*, 250 Ariz. at 295, ¶ 51. The State did not take DNA from Miller's person, nor did it take any items from his home. Rather, it simply gathered up an item that Miller abandoned in a public place. *Cf. State v. Ault*, 150 Ariz. 459, 466 (1986)

(Arizona's constitution is "specific in preserving the sanctity of homes and in creating a right of privacy."). The abandonment by Miller precludes any protections under the Arizona Constitution, which is predicated on some action by the state. *See Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 373 (App. 1988) (recognizing article II, § 8 "expressly requires state action"); *State v. Fristoe*, 251 Ariz. 255, 261–62, ¶ 21 (App. 2021) (same).

Miller argues that courts in Washington have interpreted their similar constitutional provision more broadly than the Fourth Amendment. O.B. at 65. *See Fristoe*, 251 Ariz. at 261, ¶ 19 (noting Washington Supreme Court reasoned that its state constitution provides greater protections from state action than the Fourth Amendment). *See, e.g.*, *State v. Boland*, 800 P.2d 1112, 1117 (Wash. 1990) (disagreeing with *Greenwood*, 486 U.S. 35 on state constitutional grounds and finding privacy interest in garbage in trash cans on a house's curtilage). But even in Washington the courts reject Miller's claim of a privacy interest in abandoned DNA. *See Athan*, 158 P.3d at 33 (rejecting argument that Washington Constitution's Private Affairs Clause recognized a privacy interest in the DNA from defendant's saliva); *id.* at 37 (holding there "is no subjective expectation of privacy in discarded genetic material just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place"); *see also State v. Surge*, 156 P.3d 208, 212 (Wash. 2007) (observing that the collection of DNA evidence

was "limited to the same purposes as fingerprints, photos, or other identifying information"). Thus, even applying the Washington courts' approach, Arizona's Private Affairs Clause would not require a warrant or court order to analyze an abandoned item for DNA identification.

Although Miller paints an Orwellian picture of what information can be learned from DNA, O.B. at 63, he did not establish as a factual matter that anything other than identification happened in this case, because it did not. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (noting that "concrete legal issues, presented in actual cases, not abstractions are requisite to adjudicating constitutional issues" (cleaned up)). Instead, the DNA analyst testified at the evidentiary hearing prior to argument on the suppression motion that she only looked at the "junk DNA" regions to determine that Miller's DNA matched the DNA he left at the crime scenes. R.T. 12/11/20, a.m., at 39, 62.

Moreover, as many courts have noted, DNA identification is analogous to fingerprints. *King*, 569 U.S. at 451; *In re Leopoldo L.*, 209 Ariz. 249, 254, ¶ 21 (App. 2004); *Commonwealth v. Arzola*, 26 N.E.3d 185, 191 (Mass. 2015); *Raynor*, 99 A.3d at 764; *Haskell v. Harris*, 669 F.3d 1049, 1063 (9th Cir. 2012), *aff'd en banc*, 745 F.3d 1269 (9th Cir. 2014); *United States v. Mitchell*, 652 F.3d 387, 412 (3d Cir. 2011). As described in *King*, "[t]he current standard for forensic DNA testing relies on an analysis of the chromosomes located within the nucleus of all

human cells. The DNA material in chromosomes is composed of 'coding' and 'non-coding' regions." *King*, 569 U.S. 435, 441–42 (quotations and citation omitted). Coding regions—otherwise known as genes—"contain the information necessary for a cell to make proteins." *Id.* at 442 (citation omitted). Non-coding regions, which do not relate directly to the production of proteins, are generally referred to as junk DNA; it is these regions of junk DNA that are "used with near certainty to identify a person." *Id.* Although highly useful for identification purposes, junk DNA "does not show more far-reaching and complex characteristics like genetic traits." *Id.*; *accord Raynor*, 99 A.3d at 764 (distinguishing *Skinner* because "targeted analysis of the 13 identifying loci did not reveal 'physiological data' about Petitioner, but rather, revealed only identifying information"); *State v. Belt*, 179 P.3d 443, 448 (Kan. 2008) ("In essence, the loci are merely addresses ....").

This Court has declared that it "recognize[s] the utility in uniform state and federal criminal rules, procedures, and standards." *Mixton*, 250 Ariz. at 297, ¶ 62. There is a clear national consensus on permitting police analysis of DNA on abandoned objects. *See id.* at ¶¶ 47, 64 (noting "clear consensus" regarding protection of IP address information).

Therefore, the Arizona Constitution does not require law enforcement to secure a search warrant or court order to before testing abandoned items for DNA.

### E. *Alternatively, the good-faith exception applied.*

Finally, even assuming analyzing the mug left at the restaurant was somehow improper, suppression is not warranted here. The exclusionary rule "is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Davis v. United States*, 564 U.S. 229, 236 (2011). It is instead merely a "prudential doctrine invoked to deter future violations of constitutional rights." *State v. Jean*, 243 Ariz. 331, 343, ¶ 46 (2018). Given that exclusion "requires courts to ignore reliable, trustworthy evidence" and suppresses "the truth and set[s] the criminal loose in the community without punishment," courts will suppress evidence only when "the deterrence benefits of suppression … outweigh its heavy costs." *Davis*, 564 U.S. at 237. Suppression is unwarranted unless it would deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Under the precedent good-faith exception, the exclusionary rule does not suppress the fruits of "searches conducted in objectively reasonable reliance on binding precedent." *Davis*, 564 U.S. at 231; *see also State v. Valenzuela*, 239 Ariz. 299, 309, ¶ 31 (2016) ("[W]hen law enforcement officers act with an objectively reasonable good-faith belief that their conduct is lawful, deterrence is unnecessary and the exclusionary rule does not apply.") (internal quotation marks omitted).

Detective Roestenberg took the water mug in January 2015. R.T. 10/10/22, at 111, 120. At that time, clearly establish Supreme Court precedent held that there is no expectation of privacy in abandoned property, *Abel*, 362 U.S. at 241 (1960); *accord Walker*, 119 Ariz. at 126 (1978), including garbage, *Greenwood*, 486 U.S. at 39–41 (1988).

Because no court, either before or since, has found a privacy interest in property abandoned in public, it was objectively reasonable for officers to rely on the existing precedent in 2015. *See also Jean*, 243 Ariz. at 343, ¶ 45 ("*Davis* requires good faith and reasonableness, not a crystal ball.").

## II. THE CONSTITUTION DOES NOT PROHIBIT THE EXECUTION OF ADULTS WHO COMMIT MURDER.

Miller asks this Court to find that the Eighth Amendment creates a categorical bar the against the use of the death penalty on adults who commit murder between the ages of 18 and 21. O.B. at 70. However, this Court is barred from doing so under the supremacy clause.

### A. *Standard of Review.*

This Court addresses constitutional claims de novo. *State v. Soto-Fong*, 250 Ariz. 1, 4, ¶ 6 (2020). But this Court is bound by decisions of United States Supreme Court interpreting the federal Constitution. *See State v. Sherrick*, 98 Ariz. 46, 52 (1965).

### B. *Facts and Procedural History.*

Miller was 20 when he killed Andrea and Melissa. R.O.A. 926, 8. Pretrial he moved to dismiss the death penalty based on his age at the time of the offenses. R.O.A. 377; R.O.A. 380 (response). The trial court held a hearing and denied the motion. R.T. 5/15/20, 108.

### C. *Because the Supreme Court has specifically held that the death penalty is permissible for those 18 or older at the time of their offense, it was not error to apply the death penalty to Miller.*

In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court held that the Eighth Amendment "forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." The Court found evidence of a "national consensus against the death penalty for juveniles." *Id.* at 564. At the time, 30 states prohibited the death penalty for juveniles—18 states by "express provision or judicial interpretation" and 12 states by "reject[ing] the death penalty altogether"—and "in the 20 States without a formal prohibition on executing juveniles, the practice [wa]s infrequent." *Id.*

In concluding that the death penalty was a disproportionate punishment for juveniles, the Court noted "[t]hree general differences" between adults and those under 18 that justified its holding. *Roper*, 543 U.S. at 569. First, adolescents often demonstrate a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and

decisions." *Id*. (quotations omitted). Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id*. Third, "the character of a juvenile is not as well formed as that of an adult," meaning that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." *Id*. at 570.

*Roper* recognized that "[d]rawing the line at 18 years of age" was "subject ... to the objections always raised against categorical rules." 543 U.S. at 574. "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id*. But "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," and it was, the Court concluded, "the age at which the line for death eligibility ought to rest." *Id*.

Because *Roper* clearly drew the line for death eligibility at age 18, Miller cannot show that it was error to impose the death sentences on him. Accepting Miller's argument would require more than an extension of *Roper*'s reasoning to a new situation. *Cf. Los Angeles County v. Humphries*, 562 U.S. 29, 38 (2010) (noting that "[a] holding ... can extend through its logic beyond the specific facts of the particular case"). It would require this Court to say that *Roper* drew the line in the wrong place. But this Court is "bound by the Supremacy Clause to faithfully apply" the Supreme Court's jurisprudence. *Soto-Fong*, 250 Ariz. at 10, ¶ 40. Indeed, even where Supreme Court precedent "appears to rest on reasons rejected

in some other line of decisions," *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989), or rests on "increasingly wobbly, moth-eaten foundations," it remains the "Court's prerogative alone to overrule one of its precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quotations omitted).

Further, the Ninth Circuit has expressly declined to extend *Roper* to persons who are chronologically over the age of eighteen, even in situations where they share the same emotional development comparative to that of a minor under the age of 18. *See United States v. Mitchell*, 502 F.3d 931, 981–82 (9th Cir. 2007). Other courts have recognized their inability to expand *Roper* as Miller proposes. *See United States v. Roof*, 10 F.4th 314, 379 (4th Cir. 2021) (noting "no authority to hold that executing those who are older than 18 violates the Eighth Amendment"); *United States v. Tsarnaev*, 968 F.3d 24, 96 (1st Cir. 2020), *rev'd on other grounds*, 595 U.S. 302 (2022) (whether to expand *Roper* to offenders between 18 and 20 is for the Supreme Court to decide); *Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018) (same); *Otte v. State*, 96 N.E.3d 1288 (Ohio Ct. App. 2017) (same); *State v. Chester*, 208 So. 3d 338, 353 n.10 (La. 2016) (same); *Thompson v. State*, 153 So.3d 84 (Ala. Crim. App. 2012) (same); *Mitchell v. State*, 235 P.3d 640, 658–59 (Okla Crim. App. 2010) (same); *Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006) (same); *see also United States v. Sierra*, 933 F.3d 95, 97 (2d Cir. 2019) ("Since the Supreme Court has chosen to draw the constitutional

line at the age of 18 … defendants' age-based Eighth Amendment challenges to their sentences must fail.").

Miller contends that "a national consensus has emerged against executing people who were under 21 at the time of their offense." O.B. at 78. He is incorrect. In fact, as two of Miller's sources points out, not a single state with an active death penalty scheme prohibits the death penalty for 18- to 20-year-olds.[4] The best Miller can do is point out that "23 States and the District of Columbia have outlawed capital punishment," O.B. at 75, but that hardly demonstrates a consensus with respect to 18- to 20-year-old offenders.

Additionally, as revealed by the companion article, "by exempting eighteen- to twenty-year-olds from the death penalty, the United States would be taking an

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[4] Brian Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 147, 148 n.11 (2016), https://tinyurl.com/mpfttpsa; *see* Francis X. Shen, et. al., *Justice for Emerging Adults After Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. REV. ONLINE 101, 105 (2022) (noting arguments to expand Eighth Amendment to those over 18 has never been accepted and was rejected 494 times).

unusual legal stance with respect to prevailing international norms."[5] Per that article, only Cuba and Iraq draw the line at age 21. Indeed, *Roper* noted that its holding was supported by the United Nations Convention on the Rights of the Child, which prohibits capital punishment "for crimes committed by juveniles under 18." *Roper*, 543 U.S. at 576. Miller's position is therefore inconsistent even with the international consensus that *Roper* found "instructive." *Id.* at 575. *Cf. Graham v. Florida*, 560 U.S. 48, 80 (2010) ("judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment").

Unable to show a legislative consensus against the practice, Miller asserts that the death penalty is rarely imposed on those under 21. O.B. 75–78. But the data on which he relies does not support that claim. According to one of Miller's own sources, of the 28 states that executed at least one adult between 2001 and 2015, 15 of those states executed offenders who were between 18 and 20 years old at the time of their offenses. Eschels, *Data & the Death Penalty*, at 152. This shows that more than half of the states that used the death penalty during that period applied it to 18- to 20-year-olds, even though that three-year age window is

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[5] Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 159 & n.120 (2016).

only a small fraction of the total adult population. Miller notes that only 5 of the 181 offenders (or 2.8%) sentenced to death between 2018 and 2024 were under 21. O.B. 77–78. *Cf. State v. MacHardy*, 254 Ariz. 231, 240, ¶ 26 (App. 2022) (noting lack of trials during COVID-19 pandemic). But this number is close to the data showing that 6.6% of murderers were age 18 to 19 in 2019. *See* FBI, *Crime in the United States 2019*, Expanded Homicide Data Table 3, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-homicide (1,083 of 16,245 such offenders). And the article cited by Miller indicates that 18- to 20-year-olds accounted for 17.8% of total executions between 2001 and 2015, Eschels, *Data & the Death Penalty*, at 152, while the data upon which the article relied shows that 18- to 20-year-olds accounted for about 18.8% of the total arrests for murder and non-negligent homicides in 2010. *See* Howard N. Snyder, *Bureau of Justice Statistics, U.S. Dep't of Justice, Arrest in the United States, 1990-2010*, at 17–18 (2012), https://bjs.ojp.gov/content/pub/pdf/aus9010.pdf (2,116 of 11,201 such arrests). This suggests the states apply the death penalty to 18- to 20-year-olds at a rate reasonably proportionate to their percentage of the overall relevant criminal population. Moreover, age is a mitigating circumstance not available to older offenders which means it make sense for there to be some reduction in death sentences for younger murders. *See State v. Tucker*, 215 Ariz.

298, 322, ¶ 108 (2007) ("age is a statutory mitigating circumstance which may be 'substantial and relevant'").

Finally, Miller relies on an August 2022 "resolution" from the American Psychological Association (APA).[6] OB at 79. In short, the resolution states that "based upon the rationale of the *Roper* decision and currently available science, APA concludes the same prohibitions that have been applied to application of the penalty of death for persons who commit a serious crime at ages 17 and younger should apply to persons ages 18 through 20," because "there is no neuroscientific bright line regarding brain development that indicates the brains of 18- to 20-year-olds differ in any substantive way from those of 17-year-olds." But as one court noted:

> The [APA] resolution cites approximately fifty sources in support of this position, including articles published in psychology journals, law reviews, by universities, and by at least one of each of the following: a 'nonprofit think tank,' a 'research and advocacy center,' a federal agency, and a news outlet. It also cites reports, books, online registries, and meta-analyses. Thus, it is fair to say that the APA's resolution is based on a compilation of studies, research, data, and reports, published between 1992 and 2022 and relying on data from as early as 1977

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[6] American Psychological Association, *Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class* (Aug. 2022).

*Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023), *cert. denied*, 143 S. Ct. 2452 (2023) (holding "Court lacks the authority to extend *Roper*"). The Supreme Court was fully aware at the time of *Roper* that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Yet the Court still concluded that 18 was an appropriate age at which to draw the line. *Id*. The APA's contrary view does not show *Roper* was wrongly decided.

*Roper* held that 18 is "the age at which the line for death eligibility ought to rest." *Roper*, 543 U.S. at 574. Miller has not pointed to scientific or consensus-related data that undermines this conclusion, and even if he did, it would not provide grounds for this Court to take the extraordinary step of saying that *Roper* drew the wrong line. *See Khan*, 522 U.S. at 20.

## III. THE CONSOLIDATION OF MILLER'S NON-CAPITAL OFFENSES IN A SINGLE TRIAL DID NOT PRECLUDE THEIR USE AS AGGRAVATING FACTORS UNDER A.R.S. § 13–703(F)(2).

Miller challenges the application of the (F)(2) "previously convicted" aggravating circumstance to his case because the trial on the various offenses occurred simultaneously. Because Miller did not object to the presentation of this aggravator at trial, this Court reviews solely for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005).

### A. *Facts and Procedural History.*

The single indictment against Miller included the offenses for the kidnapping, attempted rape, and murder of Andrea in 1992 as well as the kidnapping, attempted rape, and murder of Melissa in 1993. R.O.A. 1; R.O.A. 9.

For the murder of Andrea, the trial court found the (F)(2) aggravator proven based on Miller's convictions in Counts 4 and 6 for the kidnapping and attempted sexual assault of Melissa. R.T. 4/12/23, at 39; R.O.A. 926.

For the murder of Melissa, the trial court found the (F)(2) aggravator proven based on Miller's convictions in Counts 3 and 5 for the kidnapping and attempted sexual assault of Andrea. R.T. 4/12/23, at 39; R.O.A. 872.

Although Miller made various challenges to the trial court's finding of the (F)(2) aggravator, he did not argue, as he now does on appeal, that the aggravators were improper because they were found at a single trial. RT 4/12/23, at 8 (noting law allows "these things to occur in a single trial"). *Cf.* R.T. 5/15/20 at 9–10 (defense suggesting (F)(2) could be found for later in time conviction); RT 4/11/23, 13–17 (arguing whether charged offenses were dangerous).

### B. *History of the "previously convicted" aggravator.*

When Miller killed Andrea in 1992, the (F)(2) aggravator could be found when: "The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." A.R.S. § 13–703(F)(2)

(1992). When Miller killed Melissa the following year, the statute had changed to read: "The defendant was previously convicted of a serious offense, whether preparatory or completed." A.R.S. § 13–703(F)(2) (1993). *See* 1993 Ariz. Sess. Laws, ch. 153, § 1 (1st Reg. Sess.).

In 2003, this Court affirmed a trial court holding that a serious offense that occurred on the same occasion as the murder could not be used to satisfy the (F)(2) aggravator. *State v. Rutledge*, 206 Ariz. 172, 175–78, ¶¶ 15–25 & n.3 (2003). This Court based its decision not on the statute's text, but because there was no history of the (F)(2) factor being supported by a contemporaneous offense, and this Court's caselaw had previously found that such offenses should be excluded from consideration at sentencing. *See id.* at 177, ¶ 23 ("[*The*] *exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events*.") (quoting *State v. Gretzler*, 135 Ariz. 42, 57 n.2 (1983)); *accord State v. Phillips*, 202 Ariz. 427, 438, ¶ 56 (2002); *State v. Ortiz*, 131 Ariz. 195, 211 (1981).

The legislature responded by amending the statute. *See* 2003 Ariz. Sess. Laws, ch. 255, § 1 (1st Reg. Sess.); *State v. Nordstrom*, 230 Ariz. 110, 118, ¶ 35 (2012) ("2003 amendment evidently was intended to displace our ruling in *State v. Rutledge* [] which held that crimes occurring during the same course of events as

the murder could not serve as (F)(2) qualifying serious offenses."); *Rutledge*, 206 Ariz. at 176 n.3. The statute currently reads:

> [The jury may consider whether t]he defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.

A.R.S. § 13–751(F)(2).

### C. *Miller's convictions satisfy the (F)(2) aggravator.*

Both before and after the (F)(2) aggravating factor was amended by the Arizona legislature in 2003, this Court has upheld the use of convictions for other crimes as aggravating circumstances regardless of whether they were committed before or after the capital homicide. *See State v. Rogovich*, 188 Ariz. 38, 44 (1997) (citing *Gretzler*, 135 Ariz. at 57 n.2); *State v. Cropper*, 205 Ariz. 181, 184, ¶ 14 n.5 (2003) ("state can use a prior serious offense conviction as a prior conviction aggravating circumstance if the conviction occurs before the sentencing hearing in the capital case"); *State v. Moody*, 208 Ariz. 424, 470, ¶ 21 (2004) ("order of the crimes or convictions themselves is not important"). In *Gretzler*, this Court explained:

> We have held that our death penalty statute is not a recidivist or enhancement statute, the purpose of which is to serve as a warning to convicted criminals and encourage their reformation. Rather, "[w]e have stated that the 'purpose of an aggravation/mitigation hearing is to determine the character and propensities of the defendant ....'"

> Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred or the order in which the convictions were entered.

*Id.* (quoting *State v. Valencia*, 124 Ariz. 139, 141 (1979)). *See Phillips*, 202 Ariz. at 438, ¶ 56 ("Convictions for crimes consolidated for trial purposes with the murder charge satisfy F.2"); *State v. Velazquez*, 216 Ariz. 300, 309, ¶ 32 (2007) (same); *State v. Williams*, 183 Ariz. 368, 382–83 (1995) ("[V]alidity of the trial court's (F)(2) finding is unaffected by the fact that the convictions were simultaneous or by the fact that the armed robbery occurred after the murder."); *see also State v. Finch*, 202 Ariz. 410, 417, ¶ 33 (2002) (prior convictions were consolidated with murder); *State v. (Robert G.) Jones*, 197 Ariz. 290, 311, ¶ 64 (2000) (same); *Rogovich*, 188 Ariz. at 44 (same); *State v. Richmond*, 136 Ariz. 312, 318–19 (1983) (prior conviction occurred after conviction of capital murder but before resentencing); *State v. Jordan*, 126 Ariz. 283, (1980) (prior conviction occurred subsequent to murder); *State v. Steelman*, 126 Ariz. 19, 25 (1980) (same).

Miller argues that "although past cases have held that § 13–703(F)(2) applies to simultaneous convictions for serious and violent offenses, they did so solely by relying on the general purpose of aggravation, not the text of § 13–703(F)(2)." O.B. at 84. He is mistaken.

The conviction occurs upon determination of guilt; thus at the time of a capital sentencing, any convictions obtained contemporaneous with the capital

murder are "prior" to the sentencing. *See State v. Walden*, 183 Ariz. 595, 615–16 (1995). This issue was addressed in *McKinney,* in which this Court held:

> A conviction occurs when the jury renders its verdict .... The guiding principle in all these cases has been that the purpose of a sentencing hearing is to determine the character and propensities of the defendant and impose a sentence that fits the offender. The same principles apply to the (F)(2) factor present in this case .... Thus, for purposes of § 13–703(F)(2), [defendant's] second degree murder conviction occurred when the jury returned its verdict and was prior to his capital sentencing hearing.

*State v. McKinney,* 185 Ariz. 567, 580 (1996) (citations omitted). *See also Valencia*, 124 Ariz. at 141 ("Revelation of subsequent lawless acts of violence would help to attain the objectives of the sentencing statute."). There is no tension between the statute and the four decades of consistent case law that Miller asks this Court to abandon. *See State v. Hickman*, 205 Ariz. 192, 200–01, ¶¶ 37–38 (2003) (explaining that respect for precedent requires that a court not overrule precedent unless there are compelling reasons to do so, and deference to precedent is strongest when prior decisions construe a statute).

Miller cites dicta from *State v. Hidalgo*, to argue that the legislature's amendment in 2003 intended to include for the first time "offenses concurrently committed *or charged*." O.B. at 87 (quoting *State v. Hidalgo*, 241 Ariz. 543, 558, ¶ 65 (2017)) (emphasis added in O.B.). But Miller cites nothing to suggest that the 2003 legislation somehow overturns the pre-2003 caselaw on the issue. Indeed, such interpretation goes against the doctrine of legislative acquiescence. This

doctrine applies when "the legislature has considered and declined to reject the relevant judicial interpretation." *Delgado v. Manor Care of Tucson*, 242 Ariz. 309, 314, ¶ 24 (2017). It requires "some indication that the legislature deliberately did not change the law in response to a judicial opinion." *Roberts v. State*, 253 Ariz. 259, 270, ¶ 42 (2022). Here, the legislature's *explicit adoption* of this Court's consistent interpretation—that cases consolidated for trial could be used for the "prior conviction" aggravator—seems an especially clear indication of acquiescence. The State is not aware of any occurrence where the legislature's express adoption of this Court's opinion was interpreted as a rejection of the Court's opinion.

### D. *Miller is unable to prove that any theoretical error caused him prejudice.*

Even assuming some theoretical error, Miller is unable to meet his burden to prove prejudice. *See Henderson*, 210 Ariz. at 567, ¶ 19. If an aggravating circumstance was found erroneously, this Court must "independently determine if the mitigation ... is sufficiently substantial to warrant leniency in light of the existing aggravation." A.R.S. § 13–755(B). *See State v. Carreon*, 210 Ariz. 54, 73, ¶ 96 (2005) ("absent one of the circumstances defined in the statute, this Court should reweigh the aggravating and mitigating factors"); *see also State v. Schackart*, 190 Ariz. 238, 260–61 (1997) (affirming death sentence after striking (F)(2) aggravator).

Separate from the prior serious felony aggravators, the court found applicable to each murder that Miller had a prior conviction for murder under A.R.S. § 13–751(F)(1), and that each murder was committed in an especially heinous or depraved manner under A.R.S. § 13–751(F)(6). R.O.A. 926. And these aggravators are entitled to "extraordinary," and "considerable," or "great" weight respectively. *See, e.g.*, *State v. Pandeli* ("*Pandeli IV*"), 215 Ariz. 514, 533, ¶ 84 (2007) ((F)(1) prior murder conviction); State v. Cropper, 223 Ariz. 522, 529, ¶ 32 (2010) ("(F)(6) aggravator … entitled to considerable weight"); *State v. Gulbrandson*, 184 Ariz. 46, 71 (1995) ((F)(6) given "great weight").

It is also notable that the trial court sentenced Miller to death twice, for each murder. This Court has found that the prior-murder-conviction aggravator "involves the commission of multiple homicides and is therefore 'extraordinarily weighty.'" *State v. McKinney*, 245 Ariz. 225, 228, ¶ 18 (2018), *aff'd*, 589 U.S. 139 (2020) (quoting *State v. Hampton*, 213 Ariz. 167, 185, ¶ 90 (2006)). Indeed, in a host of cases, this Court has held that a defendant who committed multiple homicides not deserving of leniency despite mitigation evidence that was "not insubstantial." *Pandeli IV*, 215 Ariz. at 533, ¶ 84 (defendant's "history of neglect, sexual abuse, substance abuse, and mental health problems demonstrates that he was an extremely damaged individual" but in light of prior murder and brutality of second murder, the mitigation was "not sufficiently substantial to call for

leniency"); *see also State v. Poyson*, 250 Ariz. 48, 57–58 (2020) (listing several cases in which the multiple-homicides aggravator alone outweighed all mitigating circumstances). Finally, the Supreme Court recently noted that it found *no* cases in which this "Court has vacated the judgment of death in a case involving multiple murders." *Thornell v. Jones*, 602 U.S. 154, 170 (2024).

Thus, even should this Court toss out four decades of precedent, the aggravation in this case is strong enough to warrant death for both murders even without the (F)(2) aggravators.

## IV. THE CONSECUTIVE SENTENCES FOR COUNTS 5 AND 6 ARE LAWFUL.

Miller argues that the trial court fundamentally erred by running the attempted sexual assault convictions consecutively because doing so violated his statutory rights against double punishment under A.R.S. § 13–116. O.B. at 106.

As an initial mater, this Court has held that "[b]ecause we have upheld the death penalty in this case, that is defendant's sole punishment," and thus A.R.S. § 13–116 "do not apply." *State v. White*, 168 Ariz. 500, 509 (1991), *abrogated on*

*other grounds by State v. Salazar*, 173 Ariz. 399 (1992). If this Court upholds the death sentences, any issues regarding the non-capital counts are moot.[7]

Regardless, no error occurred because Miller was sentenced for crimes based on separate acts.

**A. *Standard of Review.***

This Court reviews the imposition of consecutive sentences to which the defendant did not object for fundamental error. *State v. Forde*, 233 Ariz. 543, 574, ¶ 137 (2014). In determining whether § 13–116 error occurred, review is *de novo*. *State v. Urquidez*, 213 Ariz. 50, 52, ¶ 6 (App. 2006).

**B. *Miller's sentences are lawful under A.R.S. § 13–116.***

Section 13–116, in relevant part, provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." To determine whether conduct constitutes a single act for purposes of § 13–116, courts apply a balancing test as follows: (1) "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge," and if the remaining

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[7] The State would request that, even if this Court finds the issue moot under *White*, it still resolves the claim. *See In re Pima Cnty. Mental Health No. 20200860221*, 255 Ariz. 519, 523, ¶ 9 (2023) ("this Court is not prohibited from considering moot issues").

evidence satisfies the elements of the secondary crime, the crimes constitute multiple acts; (2) consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime," and (3) "consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime." *State v. Gordon*, 161 Ariz. 308, 315 (1989).

Applying the *Gordon* analysis, Andrea and Melissa's murders are the ultimate crimes. Under the first prong of the *Gordon* test, this Court must subtract the evidence necessary to convict Miller of murder. *See* A.R.S. § 13–1105(A). That evidence consisted of Miller causing the deaths of both Andrea and Melissa. It is sufficient that, after subtracting the evidence for murder, the remaining evidence—Miller engaging in sexual intercourse with the victims as they lay dying or dead[8]—satisfies the elements of attempted sexual assault. *See* A.R.S. § 13–1406(A); A.R.S. § 13–1001(A); *see also* R.O.A. 859 (guilt-phase instructions). *Cf. State v. Jones*, 232 Ariz. 448 (App. 2013) (consecutive sentences improper for felony murder and child abuse arising from same act).

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[8] Miller incorrectly argues that "a completed sexual assault requires a living victim." O.B. at 109–10. This Court has refused to apply such requirement. *State v. Gallegos*, 178 Ariz. 1, 9 (1994) ("Embracing such a concept would only encourage sex offenders to first kill their victims or render them unconscious before committing the sexual offense.").

Application of the second prong demonstrates that it is not necessary to attempt to sexually assault someone in order to kill them. Applying the second prong, it was factually possible for Miller to have committed the murders without also committing the attempted sexual assaults, and conversely to have committed the attempted sexual assault without also committing the murders. *See State v. Runningeagle*, 176 Ariz. 59, 67 (1993); *cf. Carreon*, 210 Ariz. at 75, ¶ 108 (finding second part of *Gordon* not met because defendant could not have attempted murder without also committing weapons misconduct). Thus, Miller did not commit a single act.

Applying the third prong, Miller's conduct in committing the attempted sexual assaults caused Andrea and Melissa to suffer additional harm, beyond that inherent in their ultimate murders. *See, e.g.*, *State v. Huey*, 145 Ariz. 59, 62 (1985) (discussing "emotional distress in rape victims"); *cf. State v. Brewer*, 170 Ariz. 486, 502 (1992) ("Without question, defendant's act of necrophilia inflicted gratuitous violence on the victim.").

Finally, this Court has specifically found under A.R.S. § 13–116 that the crimes of sexual assault and murder involve separate acts or courses of conduct, such that consecutive sentences are appropriately applied. *State v. Beaty*, 158 Ariz. 232, 245 (1988); *see also State v. Gerlaugh*, 134 Ariz. 164, 170 (1982) (holding

under A.R.S. § 13–116 and *Gordon* that the crimes of kidnapping and murder involve separate acts or courses of conduct).

Therefore, under A.R.S. § 13–116, it was permissible for the trial court to run Miller's sentences for attempted sexual assaults consecutive to his sentences for murder.

## V. THE TRIAL COURT DID NOT STATE REASONS FOR THE CONSECUTIVE SENTENCES IN COUNT 5 AND 6 UNDER *STATE V. PEREZ-GUTIERREZ*.

The trial court sentenced Miller to consecutive terms of imprisonment on Counts 5 and 6 (the attempted sexual assault convictions). R.T. 6/7/23, at 18. The trial court did not provide reasons on the record for the consecutive sentences. *Compare* A.R.S. § 13–711(A) (requiring court to state a reason for consecutive sentences), *with* Ariz. R. Crim. P. 26.13 (not requiring a reason for consecutive sentences).

After the trial, this Court issued its opinion in *State v. Perez-Gutierrez*, 257 Ariz. 334 (2024). There, this Court adopted the requirements of § 13–711(A) as a new rule of criminal procedure and ordered that "[h]enceforth, regardless of whether a sentencing judge imposes sentences consecutively or concurrently, the judge must state on the record the reason for his or her determination." *Id.* at 338, ¶ 13. This Court then directed that, for a § 13–711(A) violation, "appellate courts should stay the appeal and remand the case for the trial court to correct its administrative error by explaining its sentencing determination on the record.

Thereafter, the appeal may proceed, and the court may address arguments regarding the trial court's sentencing decision." *Id.* at 340, ¶ 24.

Miller asserts as Issue 5 that: "[t]he trial court's failure to state its reason for its consecutive sentences on Counts 5 and 6, the attempted sexual assault convictions, warrants a remand for the trial court to state its reason." O.B. at 113. He concludes that "[t]his Court should therefore remand this matter to the trial court to state the reason for these consecutive sentences on the record." *Id.* at 114. The State acknowledges that the record does not reflect the trial court providing a reason for the consecutive sentences on Counts 5 and 6. *See* R.T. 6/7/23, at 18.

As an initial matter, this issue should be considered waived because Miller failed to preserve the record. At sentencing, the prosecutor requested "that the Court run Counts 3, 4, 5 and 6, the sentences consecutive to each other and consecutive to the sentences on Count 1 and 2." R.T. 6/7/23, at 15. A discussion was then held "off the record." *Id.* The prosecutor then said "that's my request. It's also the request of the victims' family members." *Id.* The court then ran the "sexual assaults consecutive." *Id.* at 18. "Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 513 (1982). Thus, this Court can presume that the trial court discussed the rational for the consecutive sentences at the unrecorded discussion. *Cf. State v. Emery*, 141 Ariz. 549, 553

(1984) ("To remand in such cases would be inefficient if not futile. Judicial economy requires that we intervene when the record is ... as clear as it is in the instant case.").

Regardless, should this Court affirm Miller's death sentences, then arguably any error under *Perez-Gutierrez* would be rendered moot and a remand unnecessary. *See White*, 168 Ariz. at 509 (holding that a death sentence "is defendant's sole punishment"); *see also State v. Jones*, 739 N.E.2d 300, 317 (Ohio 2000) (issue regarding consecutive sentence "rendered moot either by the execution of the death sentence or by the failure to execute the death sentence").

Finally, should this Court not find the issue waived or moot, then a limited remand would be appropriate. In that instance, in accordance with this Court's opinion in *Perez-Gutierrez*, the State requests that this Court "stay the appeal and remand the case for the trial court to correct its administrative error." *Perez-Gutierrez*, 257 Ariz. at 340, ¶ 24.[9] The State requests that this Court revest

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[9] Few cases have addressed this new remand procedure. *Cf. State v. Garcia*, 1 CA-CR 22-0377, 2025 WL 212078, at *2 (Ariz. App. Jan. 16, 2025) (*Anders* appeal after *Perez-Gutierrez* remand); *State v. Hamlet*, 1 CA-CR 23-0100, 2024 WL 4133088, at *5 (Ariz. App. Sept. 10, 2024), *review denied* (Feb. 11, 2025) (noting court had ordered a *Perez-Gutierrez* remand); *State v. Ortiz*, 1 CA-CR 23-0290, 2024 WL 3984011, at *2 (Ariz. App. Aug. 29, 2024) ("We briefly suspended this appeal for the superior court to state its reasons for imposing consecutive sentences.").

jurisdiction with the "trial court for not more than fourteen days from the filing date of this" Court's order "for the limited purpose of stating its sentencing reasons on the record." *Id.* at 341, ¶ 33.

The State requests that, should this Court affirm the trial court's order running the sentences consecutive, *see supra*, this Court note that the corrected minute entry is not an appealable order. *See* A.R.S § 13–4033.

On April 23, 2025, the State moved this Court for a limited remand to fix any technical error. *See Perez-Gutierrez*, 257 Ariz. at 341, ¶ 27 (holding § 13–711(A) violations … are 'technical errors' within the meaning of article 6, section 27"). This Court denied the motion on April 28, stating it "will address the issues presented pursuant to *Perez-Gutierrez* upon the completion of initial briefing and in due course."

## VI. NO FUNDAMENTAL ERROR OCCURRED BY SEPARATELY COUNTING THE AGGRAVATING FACTORS FOR PRIOR MURDERS AND OTHER PRIOR FELONIES.

Miller argues the trial court erred by double-counting "the same facts in weighing the aggravation under A.R.S § 13–703(F)(1) and (F)(2)." O.B. at 115. Because Miller did not raise this objection to the aggravators at trial, this Court reviews solely for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19.

### A. *The (F)(1) and (F)(2) aggravators were not double counted because they were supported by different prior convictions.*

Arizona law establishes two aggravating circumstances for prior criminal convictions. A.R.S. § 13–751(F)(1)–(2). The first factor, (F)(1), applies when "[t]he defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." The second factor, (F)(2), currently applies when the "defendant has been or was previously convicted of a serious offense, whether preparatory or completed." *Id.* Unlike other aggravating factors, prior convictions are considered a sentencing enhancement and not as an element of the offense of capital murder. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *State v. Ring*, 204 Ariz. 534, 555, ¶ 56 (2003). The prior conviction aggravators are set "apart from other circumstances [because] the original criminal proceeding, through either a guilty plea or a verdict of guilt, established the circumstance." *Ring*, 204 Ariz. at 558, ¶ 65. Thus, under the current law, the court need not "go beyond the mere fact that the prior conviction existed." *Id.* at ¶ 67. *See State v. Smith*, 215 Ariz. 221, 227, ¶ 15 (2007) ("Consideration of the underlying facts is impermissible because it would amount to a second trial."); *State v. Henry*, 176 Ariz. 569, 587 (1993) ("The statutory definition of the prior crime, and not its specific factual basis, dictates whether an aggravating circumstance exists under A.R.S. § 13–703(F)(2).").

Miller's double-counting argument is erroneous. Miller argues that "the same factual transaction—the stabbing of the other victim in the back … established both the homicide conviction used under (F)(1) and the dangerous kidnapping and attempted sexual assault convictions used under (F)(2)." O.B. at 117. But the "fact" used to find the aggravators were the various convictions, *not* the underlying acts. *Smith*, 215 Ariz. at 227, ¶ 15; *Henry*, 176 Ariz. at 587. *Cf. Allen v. Woodford*, 395 F.3d 979, 1013 (9th Cir. 2005) (discussing overlapping California aggravators involving criminal history, not convictions, that could include "crimes for which the defendant has not been convicted"). This was not a case where the same *conviction* was used to find multiple aggravators. *Cf. State v. Tittle*, 147 Ariz. 339, 345 (1985) (robbery conviction may properly constitute both (F)(1) and (F)(2) circumstances); *State v. Arnett*, 158 Ariz. 15, 21 (1988) (same). Nor does the same fact support different aggravators; as the prior convictions for murder support the (F)(1) factor and the convictions for kidnapping and attempted sexual assault support the (F)(2) factors. *Cf. State v. Carlson*, 202 Ariz. 570, 581, ¶ 38 (2002) (same facts arguably supported both pecuniary gain and murder for hire aggravators). Because these "facts" are separate and independent there is no conceptual overlap.

The death sentence for Andrea requires slightly more analysis because it occurred before 1993.[10] Prior to the 1993 amendment, (F)(2) permitted finding this aggravating circumstance when "[t]he defendant was previously convicted of a felony in the United States *involving the use or threat of violence on another person*." A.R.S. § 13–703(F)(2) (1992) (emphasis added). State law did not define "violence" in this context. Thus, the court "needed to go beyond the mere fact that the prior conviction existed." *Ring*, 204 Ariz. at 558, ¶ 67. That includes whether the prior conviction contained an enhancement for dangerousness. *State v. McCray*, 218 Ariz. 252, 257, ¶¶ 19, 24 (2008) (holding "a sexual assault that involves use or exhibition of a deadly weapon or dangerous instrument…is necessarily one that involves the use or threat of violence" (cleaned up)). Here, the convictions for kidnapping and attempted sexual assault contained a dangerousness enhancement. R.O.A. 926 at 1; R.O.A. 881 at 2. As Miller essentially concedes, *see* O.B. at 125, under *McCray* the dangerous kidnapping and dangerous attempted sexual assault convictions qualify under the 1992 (F)(2) aggravator.

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[10] Miller raises a separate challenge to the court's finding of the (F)(2) aggravator for the murder of Andrea related to the statutory change, O.B. 123–26, but does not incorporate that argument into his "double-counted" argument. Thus, he has waived it.

In sum, because it is the "fact" that Miller has prior convictions, and not the facts supporting those convictions, that matters for the (F)(1) and (F)(2) aggravators, there can be no theoretical double counting here.

### B. *Alternatively, the prior felonies for attempted sexual assault were supported by different facts than the prior murders.*

In the alternative, Miller is incorrect in his argument under the facts of this case that the (F)(1) and (F)(2) aggravators were based on the same underlying fact. The attempted sexual assaults were not based on the same act as Miller's murdering of the victims.[11] Thus, no error occurred.

As explained *supra*, Andrea and Melissa's murders are the ultimate crimes. After subtracting the evidence for murder, the remaining evidence—Miller engaging in sexual intercourse with the victims as they lay dying or dead—satisfies

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[11] Miller's argument that the dangerous kidnappings were factually predicated on the same act of stabbing the victims in the back, restraining them and ultimately killing them, holds more water. O.B. at 117. *See* R.T. 4/5/23, 10–12. *But see State v. Carlson*, 237 Ariz. 381, 401, ¶ 82 (2015) (holding under A.R.S. § 13–116 and *Gordon* that the crimes of kidnapping and murder involve separate acts or courses of conduct); *Jimenez*, 165 Ariz. at 460 n.3 (same); *Gerlaugh*, 134 Ariz. at 170 (same). But as long as at least one prior felony supports the (F)(2) aggravator, there is no error. *Phillips*, 202 Ariz. at 439, ¶ 57; *see State v. Martinez*, 230 Ariz. 208, 213, ¶ 20 (2012) ("evidence of only one prior conviction is necessary to prove the (F)(2) aggravator"); *Robert G. Jones*, 197 Ariz. at 311, ¶ 64 ("each offense provides sufficient grounds for satisfying the F.2 factors").

the elements of attempted sexual assault. *See* A.R.S. § 13–1406(A); A.R.S. § 13–1001(A); *see also* R.O.A. 859 (guilt-phase instructions).

### C. *Alternatively, the same facts can support multiple aggravators.*

Finally, Miller is incorrect when he asserts that double counting is impermissible. It is well-established that the same fact can be used to support different aggravating factors, but when this occurs, the sentencer may only weigh the act once. *State v. Chappell*, 225 Ariz. 229, 241, ¶ 48 (2010) (citing *Velazquez*, 216 Ariz. at 307, ¶ 21 and *State v. Medina*, 193 Ariz. 504, 512, ¶ 25 (1999)); *see Walden*, 183 Ariz. at 617 ("This conviction satisfies (F)(2), although having been also used for (F)(1), we only weigh it once."); *State v. Carlson*, 202 Ariz. 570, 581, ¶ 39 (2002) (same); *State v. Scott*, 177 Ariz. 131, 144 (1993) (same); *Tittle*, 147 Ariz. at 345; *State v. Bly*, 127 Ariz. 370, 373 (1980) (same).

Therefore, the only question is whether the fact-finder was properly instructed. *Chappell*, 225 Ariz. at 241, ¶ 48. The penalty phase instructions informed the trial court:

> The State may not rely upon a single fact or aspect of the offense to establish more than one aggravating circumstance. Therefore, if the court has found that two or more of the aggravating circumstances were proved beyond a reasonable doubt by a single aspect of the offense, the court will consider that fact or aspect of the offense only once. In other words, the court shall not consider twice any fact or aspect of the offense.

R.O.A. 908 at 6.

The instruction correctly informed the court how to consider the aggravating factors. As this Court explained in *Arnett*:

> Even if, as the record indicates, the trial court found two aggravating circumstances arising out of a conviction for one crime, we need not set aside the death sentence. The trial court knew it was dealing with a single act when it found at least one aggravating circumstance.

*Arnett*, 158 Ariz. at 21.

Here, the trial court knew what acts it was dealing with when it set forth its well-reasoned sentences of death for the murders of Andrea and Melissa. *See* R.O.A. 926. No error occurred.

## VII. SUFFICIENT EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE 1993 KIDNAPPING AND ATTEMPTED SEXUAL ASSAULT OF MELISSA WERE DANGEROUS OFFENSES.

Miller challenges the application of the (F)(2) "previously convicted" aggravating circumstance to the murder of Andrea, arguing that the 1993 kidnapping and attempted sexual assault of Melissa were not "dangerous." O.B. at 123. Sufficient evidence supports the trial court's finding that these offenses were dangerous.

### A. *Standard of Review.*

Because Miller did not raise this objection to the aggravator at trial, this Court reviews solely for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19.

**B. *Facts and Procedural History.***

Miller was convicted in Counts 4 and 6 for the kidnapping and attempted sexual assault of Melissa. R.O.A. 863; 865. The court found that both were dangerous offenses. R.O.A. 874; 876.

For the murder of Andrea, the trial court found the (F)(2) aggravator proven based on Miller's convictions in Counts 4 and 6 for the kidnapping and attempted sexual assault of Melissa. R.T. 4/12/23, at 39; R.O.A. 926. Specifically, the court found that those convictions were offenses "involving the use or threat of violence" under A.R.S. § 13–703(F)(2) (1992) because they were dangerous offenses for sentence enhancement purposes. R.O.A. 926 at 1; R.O.A. 881 at 2; *see also* R.T. 4/11/23, 13–17 (discussing whether charged offenses were dangerous).

**C. *The offenses were dangerous.***

In 1992, a first-degree murder could be aggravated when "[t]he defendant was previously convicted of a felony in the United States involving the use or threat of violence." A.R.S. § 13–703(F)(2) (1992). State law did not define "violence" in this context. "In determining whether a prior felony involved violence or threats, [this Court] must look to the 'statutory definition' of the crime, not the particular facts of the case." *McCray*, 218 Ariz. at 257, ¶ 17 (citing *Henry*, 176 Ariz. at 587). But "courts should consider the fact that a prior conviction included an enhancement for dangerousness." *Id.* at 257, ¶ 19.

In *McCray*, this Court held that "a sexual assault that involves use or exhibition of a deadly weapon or dangerous instrument … is necessarily one that involves the use or threat of violence." *McCray*, 218 Ariz. at 257, ¶¶ 19, 24.

Here, the convictions for kidnapping and attempted sexual assault contained a dangerousness enhancement. As Miller essentially concedes, *see* O.B. at 125, under *McCray*, convictions for dangerous kidnapping and dangerous attempted sexual assault qualify under the 1992 (F)(2) aggravator.

Miller instead argues that, to the extent the offenses "were based on some act other than the initial fatal stabbing," it was error to designate those counts as dangerous. O.B. at 125. But sufficient evidence supports the trial court's findings that the kidnapping and attempted sexual assault were dangerous offenses.

For an offense to be enhanced as "dangerous" it must involve "the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another." A.R.S. § 13–604(K) (1992). *See Bly*, 127 Ariz. at 372 ("[T]he potential for serious bodily injury or loss of human life arises when a crime is committed with a dangerous weapon. The crime itself is more reprehensible and for that reason a crime committed with a dangerous weapon or instrument shall be punished more severely ....").

Unless the object is inherently dangerous as a matter of law, "like a gun or knife," the trier of fact "can determine whether the defendant used the object in

such a way that it became a 'deadly weapon.'" *Gordon*, 161 Ariz. at 310 (quoting *State v. Bustamonte*, 122 Ariz. 105, 107 (1979)). *See also State v. Emerson*, 171 Ariz. 569, 570–71 (App. 1992) (loaded pellet gun is dangerous instrument for sentence enhancement purposes); *State v. Fatty*, 150 Ariz. 587, 589–91 (App. 1986) (affirming finding that a sock was a dangerous instrument).

Here, Miller used a knife to perpetrate the attempted sexual assault and kidnapping of Melissa. Therefore, there is sufficient evidence to affirm the court's findings of the dangerousness enhancement. *See State v. Borbon*, 146 Ariz. 392 (1985) (affirming dangerous robbery conviction when defendant struck the door of cashier's booth with a tire iron). Because Miller had the two prior convictions with a dangerousness enhancement, the trial court could use those to find the (F)(2) aggravating factor during the capital sentencing for the murder of Andrea.

## VIII. THE MITIGATION WAS NOT SUFFICIENTLY SUBSTANTIAL TO WARRANT LENIENCY.

The trial court found three aggravating factors with respect to the murders of both Andrea and Melissa. The evidence presented by the State proves the findings beyond a reasonable doubt. Moreover, Miller's mitigation is insufficiently substantial to warrant leniency. Accordingly, in light of the multiple aggravating factors, the weakness of Miller's proffered mitigation, and the circumstances of both murders, this Court should affirm Miller's death sentences on independent review.

### A. *Standard of Review.*

Because Miller murdered Andrea and Melissa before August 1, 2002, this Court "independently review[s] the trial court's findings of aggravation and mitigation" to determine the propriety of a death sentence. A.R.S. § 13–755; *see State v. Snelling*, 225 Ariz. 182, 187, ¶ 22 (2010). The question "is not whether the trial court properly imposed the death penalty, but whether, based upon the record," this Court believes "that the death penalty should be imposed." *State v. Watson*, 129 Ariz. 60, 63 (1981). This Court independently determines "if the mitigation is sufficiently substantial to warrant leniency in light of the existing aggravation." *State v. Greene*, 192 Ariz. 431, 443, ¶ 60 (1998). In so doing, this Court considers "the quality and the strength, not simply the number, of aggravating and mitigating factors." *Id*.

And, although this Court does not "'require that a [causal] nexus between the mitigating factors and the crime be established before [it] consider[s] the mitigation evidence,"' a defendant's "'failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence."' *State v. Johnson*, 212 Ariz. 425, 440, ¶ 65 (2006) (quoting *Newell*, 212 Ariz. at 405, ¶ 82); *see also State v. Roque*, 213 Ariz. 193, 231, ¶ 169 (2006) (citing *Tennard v. Dretke*, 542 U.S. 274, 289 (2004)).

Miller repeatedly uses the phrase "*de novo* review" and improperly asks this Court to disregard the trial court's credibility findings regarding the mental health experts. *See* O.B. at 127–35. Miller fails to identify the correct standard of review.

Most of the cases Miller cites are appeals from a jury's sentencing as opposed to the judge sentencing that occurred here and before 2002. O.B. at 127; *see State v. Anderson*, 210 Ariz. 327, 356, ¶ 132 (2005) ("We review de novo *the jury's* determination that the death penalty is warranted.") (emphasis added). This Court does "not defer to the findings or decision of *the jury*," with respect to aggravation or mitigation, when "determin[ing] the propriety of the death sentence." *State v. Roseberry*, 210 Ariz. 360, 374, ¶ 77 (2005) (emphasis added). But here, the trial court was the fact finder and issued a detailed special verdict discussing its findings on the mitigation and aggravation. *See* A.R.S. § 13–703(D) (1993) (trial court must set forth findings on existence or nonexistence of aggravating and mitigating factors in a special verdict); *see also Beaty*, 158 Ariz. at 246 ("Although detailed findings might be helpful in reviewing the trial court's

action in sentencing, such detailed and exhaustive findings … are not mandated by statute or case law.").[12]

"When independently reviewing a death sentence," this Court adheres "to the rule that the credibility of expert witnesses is for the trier of fact." *State v. Hoskins*, 199 Ariz. 127, 149, ¶ 97 (2000). "The trial judge has broad discretion in determining the weight and credibility given to mental health evidence." *State v. Doerr*, 193 Ariz. 56, 69, ¶ 64 (1998). *See State v. Gonzales*, 181 Ariz. 502, 515 (1995) (weight of mitigation within trial court's discretion). On independent review, this Court accords great deference to the trial court's conclusions because the "trial judge is in the best position to evaluate credibility and accuracy, as well as draw inferences, weigh, and balance." *Hoskins*, 199 Ariz. at 149, ¶ 97 (quoting *State v. Bible*, 175 Ariz. 549, 609 (1993)). *See State v. Martinez*, 196 Ariz. 451 464, ¶ 53 (2000) (deferring to the trial court's evaluation of medical experts' credibility); *State v. Canez*, 202 Ariz. 133, 163, ¶ 114 (2002) (same); *see also State v. Milke*, 177 Ariz. 118, 128 (1993) ("When mitigating evidence is conflicting and

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[12] Although A.R.S. § 13–751 no longer requires a special verdict in a bench sentencing, the trial court noted it "believes it is the best course of action to do that if we get that far. So unless you disagree with me … then if it were to go further, this Court's intention to do a full blown [verdict]." R.T. 4/3/23, at 111.

involves considerations of credibility, we give great deference to the trial court's conclusions.").

The importance of this deference is seen here through the trial court's interactions with the various defense experts. Although the court did not make specific written credibility findings, it is clear based on the court's findings at sentencing—*i.e.*, that Miller failed to prove the various proffered disorders—that the court did not find the defense experts credible. *See* R.O.A. 926 at 7–8 (Miller did not prove he has dissociative disorder, PTSD, or autism). Further examples demonstrating that the trial court found the defense experts lacked credibility include: (1) the court finding that Dr. Loring was not organized or prepared to testify and suggesting defense counsel put on a different witness, R.T. 11/15/22, at 59–62; (2) the court sustaining an objection that Dr. Brand mischaracterized video evidence that allegedly showed Miller dissociating, R.T. 12/14/22, at 12; and (3) the court expressing "consternation" at Dr. Cunningham's refusal to answer questions without taking excessive time to review impeaching material, and "the trier of fact can take that any way the trier of fact wants to take it." R.T. 2/15/23, at 6; *see* R.T. 2/14/22, at 77. The court also admonished Dr. Cunningham to answer the State's questions and that she expected professionalism. R.T. 2/14/23, at 39–40. *See also* R.T. 1/17/23, at 115–21 (trial court expressing concern that

defense counsel misled her that "Dr. Cunningham was not going to be diagnosing" Miller).

Finally, none of the defense experts prepared reports. *See* R.T. 11/14/22, at 25, 144 (Dr. Loring); R.T. 11/21/22, at 159–60 (Dr. Weller); R.T. 12/13/22, at 104 (Dr. Brand); R.T. 2/8/23, at 22–23 (Dr. Cunningham). *Compare* Ex. 834 (Dr. Kirby's report); R.T. 3/06/23, at 29 (Dr. Kohlhepp provided report); R.T. 3/13/23, at 20–23 (Dr. Garby provided report); R.T. 3/20/23, at 4–9, 29–31 (Dr. Seward provided report and supplements). And as discussed *infra*, the State thoroughly impeached the credibility of the defense experts. *See, e.g.*, R.T. 03/07/23, at 7–8 (Dr. Kohlhepp explaining how defense experts failed to look at evidence counter to their diagnosis and that having 11 mental health diagnosis, as made by defense experts, "would be exceedingly rare … even [with] the most ill psychiatric patient" and ignores Miller's "evidence of reasonably high functioning"); R.T. 11/22/22, at 14–16, 23, 65 (Dr. Weller admitted she guided her questions to Miller by reading

him diagnostic criteria from the DSM-V); R.T. 2/14/23, at 85–90 (Dr. Cunningham did not interview anyone who knew Miller at the time of the offenses).[13]

### B. *This Court should find the aggravating factors alleged by the State proven beyond a reasonable doubt.*

#### 1. A.R.S. § 13–703(F)(1): Prior Convictions Subject to a Life Sentence.

To establish this aggravator, the State had to show Miller was previously "convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." A.R.S. § 13–703(F)(1) (1993). "As long as the prior conviction is entered before the sentencing hearing,

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[13] "Dr. Cunningham is a frequent defense future-dangerousness expert in capital cases." *United States v. Caro*, 102 F. Supp. 3d 813, 848 (W.D. Va. 2015), *aff'd*, 733 Fed. Appx. 651 (4th Cir. 2018). He has never testified for the State in a capital case. *See* R.T. 2/14/23, at 71. And the trial court is not the first court to question his credibility. *See* R.T. 2/15/23, at 42–46 (impeaching with *Montez* case); *Montez v. Czerniak*, 239 P.3d 1023, 1042 (Or. App. 2010), *aff'd*, 322 P.3d 487 (Or. 2014) (listing errors in Dr. Cunningham's analysis). *See also United States v. Lee*, 274 F.3d 485, 494 (8th Cir. 2001) ("Dr. Cunningham's mitigation testimony selectively presented facts about Lee's past and his upbringing to cast him in a sympathetic light. The government's cross examination permissibly tested whether Dr. Cunningham's presentation produced a distorted account."); *State v. Klinetobe*, 958 N.W.2d 734, 739–40 (S.D. 2021) ("Dr. Cunningham's testimony suffered from a similar lack of factual validation … some of the historical facts upon which he based his theory … were ultimately not established."); *Forrest v. State*, 290 S.W.3d 704, 715 (Mo. 2009) ("motion court found Dr. Cunningham's testimony was not credible"); *People v. Mertz*, 842 N.E.2d 618, 662 (Ill. 2005) (noting Dr. Cunningham opined outside his area of expertise and "without offering any meaningful substantiation").

the conviction may support the [] aggravator even if it is committed before, contemporaneous with, or after the capital homicide." *Tucker*, 215 Ariz. at 320, ¶ 98.

Here, Miller's conviction for murdering Andrea supported the (F)(1) aggravator for the murder of Melissa and his conviction for murdering Melissa supported the (F)(1) aggravator for the murder of Andrea. *See* R.O.A. 926 at 1. Consequently, the State proved this aggravator beyond a reasonable doubt, and the aggravator applies to both murders. *See Moody*, 208 Ariz. at 470–71, ¶ 216 (murder conviction satisfies (F)(1) factor).

The prior-murder-conviction aggravator is "extraordinarily weighty." *McKinney*, 245 Ariz. at 228, ¶ 18 (quoting *Hampton*, 213 Ariz. at 185, ¶ 90); *see Pandeli IV*, 215 Ariz. at 533, ¶ 84 ("The aggravating circumstances proved by the State, however, are also substantial, especially the fact that Pandeli had previously been convicted of another murder."); *Hampton*, 213 Ariz. at 185, ¶ 90 (multiple-homicides aggravator outweighed evidence of a "horrendous childhood"); *see also Poyson*, 250 Ariz. at 57–58 (listing several cases in which the multiple-homicides aggravator alone outweighed all mitigating circumstances). Finally, the Supreme Court recently noted that it found *no* cases in which this "Court has vacated the judgment of death in a case involving multiple murders." *Jones*, 602 U.S. at 170.

### 2. A.R.S. § 13–703(F)(2): Prior Convictions for Serious/Violent Offenses.

For the murder of Andrea, the trial court found the (F)(2) aggravator proven based on Miller's convictions in Counts 4 and 6 for the kidnapping and attempted sexual assault of Melissa. R.T. 4/12/23, at 39; R.O.A. 926. For the murder of Melissa, the trial court found the (F)(2) aggravator proven based on Miller's convictions in Counts 3 and 5 for the kidnapping and attempted sexual assault of Andrea. R.T. 4/12/23, at 39; R.O.A. 872.

Miller repeats his argument that this aggravator should not be given weight because it is duplicative of the (F)(1) aggravator. O.B. at 128.

As explained in detail *supra*, the same facts do not support both aggravators. The *fact* of the prior convictions, not the *facts underlying* the convictions, are what support the aggravator. Moreover, even under Miller's flawed theory, the fact that Miller attempted to sexually assault each victim is a separate act from stabbing them to death. Miller's argument is meritless.

Thus, this Court should independently find the evidence proves the prior-serious/violent offense aggravator beyond a reasonable doubt for the murders of Andrea and Melissa.

Given the multiple victims in this case, and that the crimes were committed a year apart, this aggravator should carry substantial weight. *See State v. Martinez*, 230 Ariz. 208, 214, ¶ 22 (2012) (noting "aggravating circumstance on sentence

may increase where there is proof of more than one prior violent felony conviction" (citation omitted)); *see also State v. Bearup*, 221 Ariz. 163, 175, ¶ 65 (2009) (referring to (F)(2) and (F)(6) as "serious aggravating factors").

### 3. A.R.S. § 13–703(F)(6): Heinous and Depraved.

For each murder, the trial court found that the State proved that Miller "committed the offense in an especially heinous or depraved manner." R.O.A. 926 at 2: A.R.S. § 13–701(F)(6). Specifically, the court found:

> Andrea died relatively quickly after [Miller] stabbed her, and the evidence shows that [Miller] sexually assaulted her after she died. [Miller] mutilated Andrea's body by inflicting numerous wounds including a knife wound from her neck to her pelvis and a cut around her entire torso. [Miller] then removed Andrea's head and carried it for some distance before discarding it in the canal.
>
> Less than one year later, [Miller] murdered Melissa. She too died very quickly. He cut into her body, making incisions on her breasts and neck and carving initials into her chest. The evidence shows that, as he did with Andrea, [Miller] sexually assaulted Melissa after she died. [Miller] removed Melissa's clothes and dressed her in a bodysuit that he brought to the scene of the crime. [Miller] discarded Melissa into the canal when he was done.
>
> The heinousness and depravity surrounding these two young women's murders are clearly beyond the pale. *[Miller] did not just murder these young women, he brutalized them*.

R.O.A. 926 at 2 (emphasis added).

Post-murder mutilation of the victim's body is one way that the State can prove the (F)(6) aggravator. *See Richmond*, 136 Ariz. at 319 (ran over victim with car twice). Mutilation, "is an act distinct from the killing itself that includes the

purposeful severing of body parts." *Doerr*, 193 Ariz. at 68, ¶ 55; *see State v. Pandeli*, 200 Ariz. 365, 376, ¶ 41 (2001), *vacated on other grounds*, 536 U.S. 952 (2002) (mutilation occurred when defendant excised parts of victim's breasts after the death); *State v. Spencer*, 176 Ariz. 36, 44 (1993) (set victim's body on fire); *State v. Robinson*, 253 Ariz. 121, 137, ¶ 44 (2022) (same). Here, Miller decapitated one victim and carved symbols into the breast of the other, and inflicted numerous postmortem injuries upon both. The evidence at trial overwhelming supports the trial court's findings, and Miller does not challenge them on appeal.

Miller merely argues that this Court should not give great weight to the excessive violence he committed against Melissa and Andrea because he did it after he had already killed them. O.B. at 129–30.

"Mutilation" as an element of heinousness and depravity is an act distinct from the killing itself that sets it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38 (1979). *See State v. Murdaugh*, 209 Ariz. 19, 32, ¶ 64 (2004) ("extensive and needless mutilation of his victim" by removing head and hands "demonstrates depravity"). In *Vickers*, the defendant carved the word "Bonzai" into the victim's back, and this Court held that "Defendant's actions subsequent to the death of [the victim] indicate that the offense was committed in an especially depraved manner … [reflecting] a mental state that is 'marked by

debasement.'" 129 Ariz. at 515. *See State v. Smith*, 131 Ariz. 29 (1982) (offense heinous or depraved where defendant mutilated female murder victims' breasts and sex organs); *see also Smith v. Baker*, 983 F.3d 383, 403 (9th Cir. 2020) (death penalty based only on mutilation aggravator). Contrary to Miller's argument, as a factor supporting the (F)(6) aggravator, mutilating the victim is given additional weight. *State v. Barreras*, 181 Ariz. 516, 522 (1995). *Cf. Gulbrandson*, 184 Ariz. at 71 (holding that, because the killing was "particularly gruesome, brutal, and protracted," the "finding of gratuitous violence [was] entitled to great weight").

Miller cites only to *State v. Jimenez*, a single-murder case where the juvenile defendant "mutilated the victim's body." 165 Ariz. 444, 455 (1990); O.B at 130. In that pre-*Roper* case, this Court reduced the sentence from death to life noting the "great weight" of the age mitigator and also that the defendant showed "his mental capacity was so impaired that he was unable to appreciate the wrongfulness of his conduct at the time of the offense" and "the heinousness and depravity of this crime were directly related to defendant's mental impairment." *Jimenez*, 165 Ariz. at 459–60; *see id.* at 458–59 (State's expert agreed defendant was "completely delusional, psychotic"); *id.* at 459 (prison doctor opined defendant too mentally ill to have premediated murder). *Jimenez* is not applicable here, where Miller, an adult, understood the evil he was committing and murdered two different women with premeditation almost a year apart.

Thus, on its independent review, this Court must consider Miller's brutalization of both victims after killing them and give weight to the (F)(6) aggravator.

### C. *Miller's mitigation is insufficiently substantial to warrant leniency.*

In his brief, Miller raises seven challenges to the trial court's mitigation findings. O.B. at 130–45. The trial court "is not required to find that evidence to be mitigating. If it does find that the evidence is mitigating, the weight to be given that evidence is within its discretion." *Gonzales*, 181 Ariz. at 515 (noting from trial court's "detailed special verdict, it is clear that the trial court considered all evidence offered in mitigation" and court "was required to do no more"). Miller bears the burden of proving mitigation circumstances by a preponderance of the evidence. *Canez*, 202 Ariz. at 162, ¶ 110; *State v. McMurtrey*, 143 Ariz. 71, 72–73 (1984). For those mitigators the trial court did not find proven, this Court should likewise find Miller failed to prove them. *See Schackart*, 190 Ariz. at 253 ("Where the trial judge disbelieves a defendant's statements claiming remorse, the circumstance is generally not established.").

Miller relies on two cases where this Court reduced a death sentence in a single-murder case to life imprisonment, O.B. at 127, 142, but neither is comparable to Miller's crimes. *See Roque*, 213 Ariz. at 230, ¶ 168 (single murder with single aggravator and "[a]ll four mental health experts who testified at trial

regarding Roque's mental condition … agreed that his mental condition impaired his capacity to conform to the law"); *State v. Bocharski*, 218 Ariz. 476, 499, ¶ 109 (2008) (single murder with single aggravator).

### 1. The trial court gave the (G)(5) age mitigator appropriate weight.

Miller was 20 when he committed both murders. A defendant's age can be a statutory mitigating factor. A.R.S. § 13–751(G)(5). The trial court found this mitigator proven, specifically:

> While the Court does not find that [Miller] has low moral culpability based on his age, mental health deficits, or emotional deficits, the Court does find that [Miller] was immature for his age. The Court finds that [Miller] was of at least average to above average intelligence, and his experience up to the age of 20 was marked by his mother's abuse. The court recognizes his executive functioning was still developing and that his decision making would be affected. The court also recognizes that [Miller] was less mature than perhaps a 'typical' 20 year old. However, [Miller] did not steal a car and go joyriding. He planned and executed the murder and sexual assault of two women 10 months apart.

R.O.A. 926, at 8. The trial court found this one of Miller's weightiest mitigators. *Id.* at 25.

On appeal, Miller argues this Court should give this mitigator "even greater weight." O.B. at 130. Miller's argument is supported by neither fact nor law.

The mitigating weight of a defendant's age depends upon the "defendant's level of intelligence, maturity, involvement in the crime, and past experience." *McKinney*, 245 Ariz. at 227, ¶ 11 (quoting *State v. Jackson*, 186 Ariz. 20, 30

(1996)). As such, the mitigating weight is less when the defendant was a major participant in the crime or has a substantial criminal history. *Id.* at 227–28, ¶¶ 11–12 (attributing little mitigating weight to twenty-three-year-old defendant who took a leading role in executing and planning burglaries leading to murder); *State v. Hargrave*, 225 Ariz. 1, 18, ¶ 80 (2010) ("We discount age as a mitigating factor when the defendant had a significant criminal record or actively participated in the murders."); *State v. Womble*, 225 Ariz. 91, 104 ¶¶ 57–58 (2010) (finding significance of a nineteen-year-old defendant diminished when he is a major participant and helps plan the crime in advance); *see also Poyson*, 250 Ariz. at 54, ¶ 26 ("weight was ultimately diminished by [defendant's] criminal history, as well as his extensive participation in these crimes").

As found by the trial court, Miller "planned and executed the murder and sexual assault of two women 10 months apart." R.O.A. 926, at 25. He was not just a "major participant in the crime" but the sole participant in the crimes he planned in advance.

While it's debatable whether Miller's prior criminal record was "significant," *see* Ex. 834 at 5 (noting arson charge in 1984, shoplifting charge in 1985, arrest in 1987, criminal damage charge in 1988, and stabbing in 1989), these murders were not the first stabbings of a young woman by Miller. And Miller's

own expert testified that Miller knew that stabbing Celeste in 1989 was wrong. R.T. 11/22/22, at 72 (Dr. Weller).

Miller asserts that he had a reduced emotional age when he first became an adult, O.B. at 131, but he cites evidence from when Miller first left Adobe juvenile corrections and received help from a church with finding a place to live on his own, geting his first job, and learning to live independently for the first time. R.T. 12/8/22, at 13, 16, 18, 37, 51–54 (Miller had to "learn the skills of working"). The murders occurred several years later.

Moreover, Miller had above average intelligence, his IQ is between 108 and 126, and testing in 1989 showed him, "functioning in the superior range of intelligence." R.T. 03/20/23, at 102–03. *See* R.T. 12/8/22, at 66 (Miller at age 18 was mentally "pretty sharp"); *see also McKinney*, 245 Ariz. at 227, ¶ 11.

In sum, the trial court appropriately weighed this mitigator.

**2. This Court affords great deference to the trial court's evaluation of expert mental health testimony and should find the (G)(1) mitigating factor was not proven.**

Miller asks this Court to conduct a *de novo* review of the expert testimony and find that Miller "suffered from dissociative disorder at the time of the offense" and then find the (G)(1) mitigator proven. O.B at 132–33. But on independent review, this Court still affords great deference to the trial court's evaluation of

medical experts' credibility. *Hoskins*, 199 Ariz. at 149, ¶ 97; *Martinez*, 196 Ariz. at 464, ¶ 53; *Doerr*, 193 Ariz. at 69, ¶ 64; *Bible*, 175 Ariz. at 609.

The trial court specifically did "not find that [Miller] had any of the dissociative disorders or PTSD." R.O.A. 926. The trial court is not compelled to accept as mitigating psychiatric expert opinion testimony on significant impairment, but may reject it in favor of other psychiatric evidence which contradicts it. *Hoskins*, 199 Ariz. at 149–50, ¶ 98; *State v. Wallace*, 160 Ariz. 424, 426 (1989). The trial court entered detailed findings explaining that Miller did not prove the (G)(1) aggravator because the evidence showed that he knew what he was doing was wrong and had the ability to conform his conduct to the requirements of law:

> Based on all the testimony, the Court finds that [Miller] has proven he suffers from depression, anxiety, and hoarding disorder. … The Court finds that [Miller] is a sexual Sadist.
>
> The Court finds that the nature and quality of these maladies are insufficient to establish the (G)(1) mitigating circumstance. The Court is convinced by [Miller's] actions that he was not significantly impaired in his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> First, evidence relating to [Miller's] stabbing of Celeste [] at the Paradise Valley Mall demonstrate that he had sufficient capacity to appreciate the wrongfulness of his actions. [Miller] attempted to flee the scene of that crime, changed his clothing in order to evade capture, discarded the knife he used to stab Celeste, and initially lied to police concerning his involvement. After police apprehended him, [Miller] eventually admitted that what he did was wrong and has more recently claimed remorse for his actions. This crime was 3-4 years prior to the

> murders. The Court sees no change in circumstances from this event to the killings of Andrea and Melissa.
>
> Furthermore, the evidence recovered from Andrea and Melissa's murders indicate that [Miller] planned the killings and sought to obscure the evidence that he carried them out. [Miller] committed both crimes in poorly lit areas away from the public. [Miller] moved both Andrea and Melissa's bodies during the commission of the crimes, and then removed Melissa completely from the crime scene. [Miller] brought a knife in both instances, and in Melissa's case [Miller] brought a body suit. Soon after Melissa was murdered [Miller] lied to Randy [] about being in the area. After police arrested [Miller] in this case, he lied about being familiar with the areas where Andrea and Melissa died, even though independent evidence established that [Miller] routinely rode his bicycle there.
>
> There was testimony from multiple witnesses that [Miller] was nonconfrontational and not a violent person. Other than a few non violent incidents as a teenager and when he stabbed Celeste [], (as discussed above) [Miller] was not a troublemaker. From this evidence it is apparent that [Miller] knew what he was doing was wrong and that he could conform his conduct to the requirements of the law, but simply chose not to.

R.O.A. 926 at 7–8. *See also* R.O.A. 924 at 3 (court's statement listing additional factors supporting that Miller appreciated the wrongfulness of his conduct when he stabbed Celeste in 1989). Miller's own expert testified that Miller knew that stabbing Celeste was wrong. R.T. 11/22/22, at 72 (Dr. Weller).

The State provided evidence rebutting Miller's claim to having a dissociative disorder. *See, e.g.*, R.T. 3/06/23, at 71, 78–79, 85–86, 89–90 (Kohlhepp: Miller did not meet criteria for dissociative disorders); R.T. 2/28/23, a.m., at 9–10, 25–30 (Dr. Kirby same); *see also* R.T. 03/20/23, at 100 (Dr. Seward:

noting Miller's expert, Dr. Brand, did not give Miller the test for dissociative disorder); *id.* at 104 (Miller "not self-reporting any symptoms of dissociation to a clinically significant degree"); R.T. 1/09/23, at 55–56 (Dr. Brand's CAPS-5 test [for PTSD] showed zero dissociative symptoms). *See* Ex. 834 at 58 (Dr. Kirby, rejecting dissociative diagnosis: "suspect that [Miller] prefers to deny his involvement for secondary reasons, either because he is holding out hope for a possible acquittal or more likely because he does not wish others (especially his daughter) to perceive him as a 'monster,' when he feels that he deserves credit for being a 'nice human being,'"); R.T. 2/28/23, a.m., at 29–30 ("[Miller] wishes to maintain some degree of plausible deniability for these crimes" because of his daughter). Miller himself rejects the dissociative diagnosis. R.T. 3/6/23, at 49; Ex. 834 at 52; *see also* R.T. 3/14/23, at 95 (people who dissociate know they've lost time).

This Court's "established (G)(1) jurisprudence requires, unequivocally, that defendant be shown to suffer actual impairment due to mental illness." *Hoskins*, 199 Ariz. at 149, ¶ 96. "Personality or character disorders do not typically satisfy this statutory mitigator" and can be considered as non-statutory mitigation. *Poyson*, 250 Ariz. at 53, ¶ 19. But "mental health issues are entitled to little weight when there is no connection to the crime and no effect on the defendant's ability to conform to the requirements of the law or appreciate the wrongfulness of his

conduct." *Id.* at ¶ 20. *See State v. Prince*, 226 Ariz. 516, 542, ¶ 113 (2011) (noting mental health mitigation is weighed in proportion to the defendant's ability to conform or appreciate the wrongfulness of his conduct).

Miller only provided credible testimony that he has some depression, anxiety, and hoarding issues. Dr. Garby testified that Miller's sexually sadistic actions were not the result of trauma, but rather because he is a sexual sadist. R.T. 3/13/23, at 167. Such a conduct disorder does not support the (G)(1) mitigator. *Poyson*, 250 Ariz. at 53, ¶ 19; *Smith*, 215 Ariz. at 235, ¶ 67.

This Court should hold that the trial court correctly determined that the (G)(1) impairment mitigator was not established.

**3. Miller did not establish that he has autism.**

Miller asks this Court to reweigh the expert evidence considered by the trial court and hold that the court was wrong when it concluded Miller failed to prove by a preponderance of the evidence that he has autism spectrum disorder ("ASD" or "autism"). O.B at 133. But on independent review, this Court still affords great deference to the trial court's evaluation of medical experts' credibility. *Hoskins*, 199 Ariz. at 149, ¶ 97; *Martinez*, 196 Ariz. at 464, ¶ 53; *Doerr*, 193 Ariz. at 69, ¶ 64; *Bible*, 175 Ariz. at 609.

Dr. Weller considered Miller to be "high functioning on the autism spectrum." R.T. 11/21/23, at 17; *id.* at 76 ("milder form of autism"). But Dr.

Weller did not test Miller for autism, *id.* at 62–63 (claiming limited tests for adults), and most people she interviewed only knew Miller *after* the time of the offenses when he was an older adult, *see, e.g.*, R.T. 11/22/23, at 72–75 (didn't interview relatives that lived with him). Dr. Cunningham also did not test Miller for autism, claiming there was no gold standard test for adults. R.T. 2/15/23, at 33–34.

But several experts, including Dr. Weller, noted the existence of a test for adults with autism, the ADOS-2. R.T. 11/21/23, at 63 (Weller); R.T. 3/14/23, 114–15 (Dr. Garby); *see also* Merritt's Neurology, Ch. 143 (14th Ed. 2021) (Westlaw: LWWNEURO14TH CH143) (The ADOS-2 "is considered the 'gold standard' diagnostic instrument for ASD.").

Although Dr. Cunningham did interview some people who knew Miller in childhood, he did not question or test their reliability. *Compare* R.T. 1/17/23, at 91–98, 111–13, 146, 153 (Dr. Cunningham reliance on Pinky); R.T. 1/18/23, at 31, 45–46, 71–79, 176 (same); *and* R.T. 1/17/23, at 96 (Dr. Cunningham "called [Pinky] specifically to inquire about autism-related symptoms"), *with* R.O.A. 926 at 23 (court finds "Pinky has questionable credibility and gives her statements little weight"). *Compare also* R.T. 11/17/22, at 135, *with*, R.T. 1/18/23, at 113–17 (alleged statements by Jerald Schrock to Dr. Cunningham about whether or not Miller had a "meltdown" when rejected by a woman contradicted at trial; court

agrees its unreliable). *See also* R.T. 2/16/23, a.m., at 45, 56–58 (George Terry blamed Miller's mom Ellen for his fraud arrest); R.O.A. 926 at 23–24 (court noting "Mr. Terry's bias against Ellen"). As a child, Miller interacted with education professionals familiar with autism and who did not suspect Miller of having autism. For example, Ms. Elliot, who was Miller's counselor in the 1980s—and remembered him because of an incident when Miller cut vaginas into his mom's Barbie dolls—was familiar with autism and never thought Miller might be autistic. R.T. 3/2/23, at 6–25, 96.

Finally, the State presented evidence that Miller does not meet the criteria for ASD. *See* R.T. 2/28/23, p.m., at 323 (Dr. Kirby); R.T. 03/06/23, at 71, 78–79, 85–86, 89–90 (Dr. Kohlhepp: "in my observation of Mr. Miller, he didn't present with any of those hallmark signs or reported symptoms of autism"); R.T. 3/14/23, at 111–13 (Dr. Garby: describing Miller's social anxiety compared to autism); *see also* R.T. 3/20/23, at 6 (according to Dr. Seward, Miller does not have impaired autism).

Moreover, the trial court, in its findings, noted that Miller "may have high functioning Autism but the proof of that does not rise to the level of preponderance of the evidence." R.O.A. 926, at 7. Miller fails to show how, even assuming he does have high functioning autism, this would be more than minimal mitigation. *See* R.T. 3/16/23, at 137 (Dr. Kirby: "If he had autism, he has had it his entire life,

it's a life-long disorder. If he had autism, he had it at the time that he stabbed Celeste [], and he certainly appreciates the wrongfulness of that."); *cf.* R.T. 2/15/23, at 110 (Dr. Cunningham: "the nature of social dysfluency and high functioning autism is not a matter of you can't carry on a conversation, you could never look anybody in the eye, you could never have an acquaintances; but, instead the … quality of relationships that you can develop is deficient as compared to a non autistic, what we would call neuro typical normal people in the community"); *see also* DSM-5-TR at 63–64 (5th ed. 2022) ("[A]s diagnosis of autism spectrum disorder is made more frequently in those who have superior language and intellectual abilities, more individuals are able to find a niche that matches their special interests and skills and thus are productively employed …. In general, individuals with lower levels of impairment may be better able to function independently").

Some courts have noted the limited usefulness of autism as mitigation evidence. *See, e.g.*, *People v. Larsen*, 140 Cal. Rptr. 3d 762, 782 (Cal. App. 2012) ("connection between the symptoms of defendant's [ASD] and the evidence of intent to commit the charged conspiracy was not at all persuasive, and the evidence of guilt was compelling"); *State v. Allen*, 557 P.3d 28, *4 (Kan. Ct. App. 2024) ("Whether a particular defendant ought to receive a mitigated punishment would depend on the charged crime and the surrounding factual circumstances coupled

with specific effects of the defendant's autism on their criminal culpability."); *United States v. Lucarell*, 22-3732, 2023 WL 3756191, at *2 (6th Cir. June 1, 2023) (rejecting argument sentencing court should have placed more mitigation weight on autism diagnosis when defendant knew right from wrong); *see also* Sheena Foster, *Autism Is Not A Tragedy*, 2 LINCOLN MEM'L U. L.R. 1, 12–13 (2015) (high functioning autism may lead to a "greater tendency toward violent crime" but does not equate "to a lack of intent"). Indeed, the Fifth Circuit in *United States v. Boukamp*, went so far as to note that an insinuation that defendant's autism "was a direct cause of," the offenses of kidnapping and rape, was an argument "incredibly offensive to the autism community." 105 F.4th 717, 737 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 595 (2024) ("autism did not mitigate the disturbing nature and circumstances of [defendant's] offenses").

Thus, Miller failed to provide credible testimony that he has autism, and while the court noted Miller "may have high functioning Autism," Miller fails to show why an ASD diagnosis would even be a meaningful form of mitigation in this Court's independent reweighing.

**4. Miller's sexual sadism disorder is afforded little weight.**

Miller complains that his non-statutory metal health mitigation should be given additional weight. O.B. at 136. The trial court found the sexual sadism disorder diagnosis was entitled to little weight: "Mental health disorders are

considered mitigating but may be accorded little weight without some connection to a defendant's offenses. … Based on the mental health diagnoses the Court has found proven, the Court finds that this mitigating factor is entitled to little weight." R.O.A. 926 at 17.

Miller notes that his diagnosis of sexual sadism is connected to the offenses. O. B. at 137. But as this Court has found, when a "disorder does not rise to the level of a statutory mitigating circumstance, [] we give it little weight as a non-statutory mitigating circumstance." *Tucker*, 215 Ariz. at 323, ¶ 118. Specifically, this Court has afforded little weight to conduct disorders. *Cf. State v. Bolton*, 182 Ariz. 290, 314 (1995) ("A conduct disorder, however, is not sufficient to constitute a mitigating circumstance."). In *Smith*, this Court addressed the limited mitigation for sexual sadism and held:

> Smith's mental health expert testified that he suffered from sexual sadism with a form of anxiety disorder, which contributed to the commission of the murders. The role of Smith's mental health in the commission of these murders, and therefore the quality of the mitigation, however, is called into serious question by testimony that Smith could have controlled his impulses and that he likely knew what he was doing and that it was wrong.

215 Ariz. at 235, ¶ 67. *Cf. Hoskins*, 199 Ariz. at 153, ¶ 117 (affording minimal weight to personality disorder related to impulsivity when defendant's "actions were anything but impulsive").

Thus, this Court should agree that Miller's sexual sadism disorder does not warrant substantial mitigating weight. *See Medina*, 193 Ariz. at 517 (finding trial court correctly gave anti-social personality disorder little or no mitigating weight because defendant's conduct was the result of his voluntary choice).

**5. Miller's lack of future dangerousness is afforded little weight.**

Miller does not pose a future danger. R.O.A. 926, 20–21. Contrary to Miller's argument, O.B. at 137–38, this mitigator is not weighty, *see, e.g.*, *Pandeli IV*, 215 Ariz. at 533, ¶ 82 (lack of "future dangerousness" given "little weight [] because prisoners are expected to behave and adapt to prison life"); *State v. Andriano*, 215 Ariz. 497, 512, ¶ 74 (2007) (weakness of the good inmate mitigator); *State v. Spreitz*, 561 P.3d 393, 407 (Ariz. 2025) ("the record reflects Spreitz's efforts at personal improvement and, based on testimony from jail personnel, of his willingness to assist other inmates, we accord this circumstance little weight").

**6. The trial court gave the childhood mitigating evidence appropriate weight.**

Miller complains that his non-statutory mitigation regarding his unpleasant childhood should be given additional weight. O.B. at 138. The trial court found that Miller "presented significant evidence of his abusive upbringing." R.O.A. 926

at 22. But the trial court found Miller "is not a reliable reporter" and therefore focused on evidence from third-party accounts of Miller's childhood, including:

> [Miller's] Aunt Barb [] testified that Ellen was not a loving or nurturing mother. Instead, Barb saw Ellen as controlling and once saw her smack [Miller]. Barb testified that Ellen would buy things like toys or candy and would not let [Miller] have them. Barb noted that [Miller] was apprehensive around Ellen and would flinch when she gesticulated. On one occasion, Barb heard Ellen yell at [Miller] and tell him that she was going to put him in a place where he would be 'buttfucked.' While [Aunt Barb] has some clear bias towards [Miller], the Court still largely finds her credible.
>
> Gail [], Ellen's cousin, visited Ellen and [Miller] at least three times. Gail felt Ellen was controlling and not affectionate. During one visit, Gail recalled Ellen confronting [Miller] about some missing cookies. Ellen accused [Miller] of stealing the cookies, taking them to school, and trading them for sex. [Miller] reacted in this situation by crouching and sobbing. Gail testified that Ellen threatened to send [Miller] to an institution and that [Miller] begged her to do so. [Miller's] second grade teacher Victoria [] stated that she saw what she thought were hanger marks on [Miller's] back and possibly cigarette burns on his arm.
>
> Jarrett [] knew [Miller] in Hawaii for about 2 years when [Miller] was 10 years old. Jarrett could tell that [Miller] was always on edge with Ellen and would often flinch around her. Jarrett saw Ellen hit [Miller] once and heard him being hit by Ellen from inside the house. Pinky knew [Miller] during the same time. Pinky said that Ellen treated [Miller] like a dog and made him eat out of a dog bowl. Pinky also saw Ellen hit [Miller], throw him into furniture, and harshly grip him on his upper arm. Pinky saw bruises on [Miller]. The Court finds, however, that Pinky has questionable credibility and gives her statements little weight.
>
> Paul [], a missionary that briefly lived with [Miller] and Ellen in Hawaii, thought Ellen was a good mom but had a temper. Paul also recalled seeing bruises on [Miller] around this time. Paul also interacted with [Miller] and Ellen after they moved to Phoenix, but his

> views of Ellen may have changed at this time due to the relationship he pursued with her. The same is true of George Terry. George felt that Ellen was verbally abusive and that [Miller] 'took it,' but Terry's bias against Ellen may have colored his depiction of her.
>
> Cynthia Elliot never saw Ellen abuse [Miller], but Cynthia had the impression that Ellen did not care for [Miller]. Indeed, Ellen seemed to care more about the condition of Barbie dolls [Miller] defaced rather than the wellbeing of her own son. Leslie [] briefly taught [Miller] in high school and recalled that Ellen was not home and that [Miller] was hungry and dirty, but she was not aware of any abuse, physical or otherwise.

R.O.A. 926 at 23–24.

The trial court noted that the "most severe aspects of [Miller's] evidence concerning an abusive childhood come from his self-reports to various experts," which the trial court found not reliable but also did not discount in their entirety. *Id.* at 24. In sum, the trial court found that "Ellen was certainly not a loving or nurturing mother." *Id.* at 25. Of all the proffered mitigation, the trial court gave the most weight to Miller's age and "the abuse he suffered at the hands of his mother." *Id.* at 25. This mitigation does not warrant leniency. *See, e.g.*, *State v. Burns*, 237 Ariz. 1, 34–35, ¶¶ 169–71 (2015) (affirming a death sentence despite a "difficult childhood" and "dysfunctional family").

Miller complains that the trial court did not credit his nexus theory connecting the abuse from his mother with his sexual sadism disorder and his two premeditated rape and murders. O.B. at 139. As an initial matter, and as discussed elsewhere, Miller's experts were not credible. Miller's temporal nexus argument

also falters, because Miller did not commit the murders until nearly four years after he left home. *See* O.B. at 140; *see also* R.T. 3/15/23, at 4 (Miller's relationship with mom improved as he got older). *Cf. Poyson*, 250 Ariz. at 55, ¶ 32 ("Because Poyson was only nineteen when he committed the triple murder, the childhood abuse he endured is temporally proximate to his crimes"). Finally, Miller's brief misrepresents the testimony of the State's sexual sadism expert. *See* O.B. 140–42.

Dr. Garby testified that she knew of no research that has ever supported Miller's theory that early childhood development leads to sexual sadism. R.T. 3/14/23, at 79; R.T. 3/15/23, at 54–55, 61. Dr. Garby's testimony about "correlation," O.B. at 140—and "correlation doesn't mean causation"—was between childhood development and domestic violence generally, *not sexual sadism*, which she clarified on the very next transcript page is a *different category of offender*. R.T. 3/14/23, at 26–27. Moreover, Dr. Garby explained that in general "victims are more likely to grow up and be victims and not perpetrators of violence or rape or sexual molestation of children." R.T. 3/15/23, at 61.

Miller references the "Burgess study," O.B. at 140, but as Dr. Garby explained, that study involved murders "with a sexual component"—most such murders are generally not "sexually sadistic" and the Burgess study said nothing about sexual sadists, R.T. 3/15/23, at 56–59. Moreover, that "study" had no

control group, and its authors specifically warned against making generalized conclusions from it. *Id.* at 59–60; *see id.* at 54 ("it was a study, quote/unquote").

Miller also argues that Dr. Garby "acknowledged articles holding that paraphilic disorders, like sexual sadism, are 'rooted in early childhood development.'" O.B at 140 (citing R.T. 3/14/23, at 44–46).[14] But this also mischaracterizes Dr. Garby's testimony. She acknowledged the text of an old article read to her by defense counsel. *See* R.T. 3/15/23, at 48 ("Defense is just testifying by reading"). She then explained to defense counsel that the articles were not discussing sexual sadism. *Id.* at 50–52; *see id.* at 56, 59–60. Miller asserts that Dr. Garby was dismissive of Miller's reliance on older studies connecting childhood development and sexual deviancy. O.B. at 141. *See, e.g.*, R.T. 3/15/23, at 45, 51, 52 ("what they believed back in 1976"). Dr. Garby rejected the validity of those older articles and explained how they were not relevant and not about people like Miller with sexual sadism. *Id.* at 52, 54. Indeed, some of Miller's referenced studies are so old that the "sexual deviancy" could include innocent acts like homosexuality. *See* DSM-II, 44 (2d ed. 1968); DSM-III, 281–282 (3d ed. 1980); *cf. Boutilier v. INS*, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting) (disagreeing with majority that homosexuality is included

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[14] Miller is actually quoting from R.T. 3/15/23.

in phrase "psychopathic personality" arguing its merely "one, who by some freak, is the product of an arrested development").

Dr. Garby explained what lead her to diagnosis Miller as a sexual sadist and how it is different from other sexually motivated homicides:

> if you have decapitation, severe strangulation, that type of thing, you're more likely dealing with a sexual sadist. And if you see those kind of behaviors with more than one victim, it increases the likelihood that you are dealing with someone who is a sexual sadist. … The fact that there was semen found on two deceased women's bodies with strangulation, evisceration, and cutting of their breast, and mutilation of their bodies is consistent with the fantasies that you would see with somebody who is a sexual sadist … with sexual sadists you're more likely to see cutting and that type of behavior, over the top, because it's not about getting the sex, it's part of the arousal for the sex. So that's the difference for the sadist.

R.T. 3/15/23, at 92, 95.

Miller also argues that this Court should find the trial court erred by concluding Miller's mother did not show him violent pornography in "early childhood" rather than as "a young teenager," because it was "independently corroborated." O.B. at 142; R.O.A. 926 at 25. But Miller ignores that Dr. Cunningham agreed he did not know if Miller watched the identified films while living with his mother, R.T. 5/2/23, at 69, particularly when those films were recorded in 1986—when Miller was 14—meaning his mother did not show him the films at age 12. *See* R.T. 2/8/23, at 37. Moreover, the credibility of the alleged third-party witnesses Miller relies upon was thoroughly impeached. *See* R.T.

5/2/23, at 69–78 (impeaching Dr. Cunningham's reliance on Pinky as a reporter on Miller's childhood); Ex. 761 (interview of Pinky); *see also* R.O.A. 926 at 25 (court found "Pinky has questionable credibility and gives her statements little weight").

Finally, evidence that murders were planned or deliberate, like the murders here, decreases the mitigating effect of prior childhood abuse. *Cropper*, 223 Ariz. at 529, ¶ 30; *State v. Armstrong*, 218 Ariz. 451, 465, ¶¶ 75–76 (2008).

In sum, the trial court gave this evidence appropriate weight.

**7. Miller's life post-offense deserves minimal weight.**

Miller argues that "his positive parenting, positive involvement in subcultures, positive work history, lasting friendships, current family support, artistic abilities, obtaining his GED, lack of substance abuse, lack of criminal history after [2002], and positive life progress" should be given "substantial weight." O.B at 143–44.

The trial court found these mitigating factors but correctly gave them little mitigating weight. R.O.A. 926 at 19–21. *See Spreitz*, 561 P.3d at 407 ("record reflects Spreitz's efforts at personal improvement … we accord this circumstance little weight"). On appeal, Miller ignores the negative aspects of his life post-murders that justified the trial court not giving them substantial weight.

For example, the trial court found that Miller loves his daughter and "adequately" raised her. R.O.A. 926 at 19. But Miller's daughter described him as

"a mixture of controlling and neglect" and stated that he would spend their limited funds on his hobbies rather than necessities like food or clothes. Ex. 834 at 29; *see* R.T. 5/15/23, at 13–15 (Miller put his needs above family); *id.* at 20–21 (left daughter alone as young as 6, she is in counseling to address trauma of growing up with Miller). He also worked to prevent his daughter spending time with her mother. R.T. 5/22/23, at 13–16 (controlling/neglectful of daughter); *see* Ex. 961 at 0:18:20 (daughter: "Sometimes [Miller] gets really upset and all he really does is yell he doesn't do anything else."); R.T. 1/3/23, at 34–35 (Dr. Weller discussing Miller's possessions that made daughter uncomfortable including his bondage figurine).

Miller argues that his positive involvement in subcultures is mitigating, O.B. 145, however Miller selfishly would spend limited funds on those hobbies rather than supporting his family. R.T. 5/15/23, at 13–15. It became so bad that when he was living with Amy's family, he maxed out her grandmother's credit card on unneeded car accessories requiring her to file for bankruptcy. *See* R.T. 5/22/23, at 31–33.

Miller was abusive towards his wife Amy for many years. *See, e.g.*, R.T. 3/9/22, at 115, 116, 144–46. Miller was better with his girlfriend Seraphina but still choked her on occasions. R.T. 12/5/22, at 77, 80–81.

Accordingly, this Court should find the asserted mitigating factors to be weak. *See Tucker*, 215 Ariz. at 322, ¶ 116 ("relationship with [defendant's] family and friends may be a mitigating circumstance, yet the Court has often found that this circumstance should be given little weight").

Miller lists "reason[s] for life." O.B. at 145. But as the prosecutor put it:

> But what [Miller] did, the gravity of what he did, the planning that it took, the thinking that it took, the brutality of what he did, the impact that this had on the family of these young women, what he stole from these young women deserves execution. … Andrea and Melissa didn't get to choose when they died. They didn't get to choose the day, the hour, the moment. [Miller] deserves to know the day, the hour of his death for what he did.

R.T. 5/24/23, at 44.

Miller's mitigation evidence is not sufficiently substantial to warrant leniency. The aggravation supporting a sentence of death for each murder is weighty. Accordingly, this Court should affirm his death sentences.

## IX. THIS COURT HAS ALREADY REJECTED MILLER'S ADDITIONAL CHALLENGES TO HIS CONVICTIONS AND SENTENCES.

Miller summarily raises 19 additional constitutional challenges to his death sentence, purportedly preserving them for federal review. O.B. at 146. Miller, however, concedes this Court has previously rejected the claims, and he does not argue why the decisions should be overruled. *Id.* This Court must therefore deny the claims. *See Anderson*, 210 Ariz. at 359, ¶ 146.

## CONCLUSION

For these reasons, the State respectfully requests that this Court affirm Miler's convictions and sentences.

Respectfully submitted,

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